

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... J. V. WOODMAN, *Middle Temple.*

High Court, Allahabad ... W. K. PORTER, *Gray's Inn.*
J. M. BANERJI, *Inner Temple.*

VOL. XXXVIII
1916.

ALLAHABAD.
PRINTED AND PUBLISHED BY THE SUPERINTENDENT, GOVERNMENT PRESS.

JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1916.

CHIEF JUSTICE

THE HON'BLE SIR HENRY GEORGE RICHARDS, KT., K.C. *(On leave from the 4th June to the 31st July.)*

PUISNE JUDGES

THE HON'BLE SIR GEORGE EDWARD KNOX, KT. ... *(Acting Chief Justice from the 5th June to 31st July.)*

" SIR PRAMADA CHARAN BANERJI, KT. ... *(On leave from the 1st June to the 15th July.)*

" WILLIAM TUDBALL .... *(On leave from the 1st April to the 31st July.)*

" MUHAMMAD RAFIQ.

" THEODORE CARO PIGGOTT ... *(On deputation from the 10th October to the 30th November.)*

" HENRY CECIL WALSH, K.C.

" BENJAMIN LINDSAY .... *(Officiated from the 1st April to the 31st July.)*

" PANDIT SUNDAR LAL, C.I.E ... *(Officiated from the 1st June to the 15th July.)*

" LOUIS STUART .... *(Officiated from the 10th October to the*

A TABLE
OF THE
NAMES OF CASES REPORTED IN THIS VOLUME.

PRIVY COUNCIL.

	Page.
Ahmad Raza *v.* Abid Husain	494
Chandrika Bakhsh Singh *v.* Indar Bikram Singh	440
Debi Bakhsh Singh *v.* Sheik Lal	271
Fateh Chand *v.* Rup Chand	445
Hamira Bibi *v.* Zubaida Bibi	481
Jhanda Singh *v.* Wahid-ud-din	570
Muntazi Husain Khan *v.* Muhammad Yasin Khan	552
Parbhu Dayal *v.* Makbul Ahmad	163
Radha Kunwar *v.* Rooh Singh	488
Sadik Husain Khan *v.* Hashim Ali Khan	627

FULL BENCH.

Jagmani *v.* Bisheshar Dube	866
Jiban Kunwar *v.* Gobind Das	56
Kalka Prasad *v.* Manmohan Lal	802
Nun Miah *v.* The Ganges Sugar Works, Limited	180
Pleader In the matter of a—	182
Rangi Lal *v.* Jassa	286
Shambhu Singh *v.* Daljit Singh	249
Somwarpuri *v.* Mata Badal	361

APPELLATE CIVIL

Abdul Karim *v.* Islam-un-nissa Bibi	339
Abid Ali *v.* Imam Ali	92
Ali Husain *v.* Hakim-ullah	230
Bajnath Prasad Singh *v.* Tej Bali Singh	580
Bajnath Rai *v.* Dharam Deo Tiwari	315
Bajrangi Lal *v.* Ghura Rai	202
Bans Gopal *v.* Sheo Ram Singh	97
Barati Lal *v.* Salik Ram	107
Basdeo Rai *v.* Dwarka Ram	176
Beni Prasad *v.* Lajja Ram	462
Bhawan *v.* Madan Mohan Lal	533
Bhoj Raj *v.* Ram Narain	530
Bisheshar Ahir *v.* Dukhiram Ahir	197
Chattar Singh *v.* Amir Singh	204
Desraj *v.* Sagar Mal	37
Dhanraj Singh *v.* Lakhrani Kunwar	509
Digbija Singh *v.* Hira Devi	322

	Page.
Dujai v. Shiam Lal	122
Fazal Ahmad v. Wesal-ud-din	481
Ganga Dahal Rai v. Musammat Gaura	469
Ganga Singh v. Ram Sarup	223
Ganpat Rai v. Multan	226
Goswami Sri Raman Lalji v. Hari Das	474
Gulzari Lal v. Lutfi Husain	181
Gur Dayal Singh v. Karam Singh	254
Haidwari Lal v. Salamat-ullah Khan	358
Hari Kunwar v. Lakhmi Ram Jain	380
Har Narain v. Bishambhar Nath	83
Har Prasad v. Mukand Lal	70
Himmat Bahadur v. Dhanpat Rai	335
Imami v. Musammat Kallo	433
Jadubansi Kunwar v. Mahpal Singh	111
Jagannath Prasad v. U. P. Flour and Oil Mills Company, Ld	347
Jamna Das v. Ram Autar Pande	209
Kanhaiya Lal v. Kishori Lal	679
Karam Ilahi v. Sharf-ud-din	212
Kasturi v. Panna Lal	520
Khetra v. Mumtaz Begam	72
Khali Ram v. Taik Ram	540
Kharshed Ali v. Abdul Majid	361
Kishan Lal v. Sultan Singh	5
Kunwar Sen v. Darbari Lal	411
Lachmi Narain v. Darbari Lal	357
Lachmi Narain Prasad v. Kishan Kishore Chand	126
Madho Ram v. Nihal Singh	21
Mahabir Prasad v. Masat-ullah	103
Mahabir Singh v. Bhagwanti	225
Mahadeo Prasad v. Jagar Deo Gir	200
Muhammad Abdul Jalil v. Ram Dayal	484
Muhammad Ali v. Baldeo Pande	148
Muhammad Khalil v. Muhammad Ibrahim	201
Muhammad Mahbub Ali Khan v. Raghubar Dayal	27
Muhammad Siddiq v. Mahmud-un-nissa Bibi	191
Mukta Prasad v. Mahadeo Prasad	327
Municipal Board of Allahabad v. Tikandar Jang	52
Munni Kunwar v. Madan Gopal	62
Murlidhar v. Diwan Chand	214
Najm-un-nissa Bibi v. Amina Bibi	188
Narain Das v. Musammat Dhania	174
Naubat Rai v. Dhaukal Singh	184
Nisdar Singh v. Ganga Dei	676
Nihal Singh v. The Collector of Bulandshahr	237

	Page.
Nihal Singh v. Khushhal Singh	297
Nihal Singh v. Sewa Ram	292
Pallia v Mathura Prasad	280
Param Hans v. Randhir Singh	461
Piari Lal v Hanif-un-nissa	240
Radhika Prasad Bapudo v. Secretary of State for India in Council ..	438
Raj Mangal Misir v Mathura Dubain	1
Ram Charan Lal v Rahim Baksh	416
Ram Harakh v Ram Lal	217
Ram Narain v. Jagan Nath Prasad	113
Ram Ratan Lal v Bhuri Begam	7
Ram Sarup v. Jaswant Rai	82
Ram Ugrah Pande v. Achraj Nath Pande	85
Sakhawat Ali Shah v. Muhammad Abdul Karim Khan	59
Santi Lal v. The Indian Exchange Bank	537
Sheo Shankar v. Chunni Lal	669
Sital Prasad v Gobind Prasad	75
Suraj Bhan v. The Boot and Equipment Factory, Agra	407
Taj Singh v. Jagan Lal	289
Udhishter Singh v Kausilla	393
Udit Narain Misir v. Asharfi Lal	502
Wasi-uz-zaman Khan v Fauza Bibi	131

APPELLATE CRIMINAL.

Emperor v. Abdur Rahman	661
Emperor v Brikhbhan Singh	14
Emperor v. Dhani Ram	49
Emperor v. Jawahir Thakur	440
Emperor v Kalka Prasad	42
Emperor v. Mian Din	47
Emperor v. Rustam	29

REVISIONAL CIVIL.

Chotey Lal v. Lakhmi Chand Magan Lal	425

REVISIONAL CRIMINAL.

Bhairon Prasad v Amina Begam	690
Emperor v. Ajaz Husain	600
Emperor v. Bechan Pande	457
Emperor v. Bhagwani Dat	276
Emperor v. Bhawani Das	160
Emperor v Bhima	911
Emperor v. Bhola Singh	32
Emperor v Gaya Bhar	517
Emperor v. hamman	455
Emperor v. obind Sahai	134
Emperor v Husain Khan	354
Emperor v Kashu Shukul	695

	Page.
Emperor v. Lal Bihari	393
Emperor v. Lal Singh	395
Emperor v. Murli Dhar	264
Emperor v. Ram Dayal	40
Emperor v. Shambhu Nath	403
MISCELLANEOUS CIVIL	
Ganga Prasad v. Har Naram	466
Jai Kishan Joshi v. Budhanand Joshi	136
McGowan v. McGowan	633
Ram Singh v. Musammat Bhani	117

TABLE OF CASES CITED.

A.

Page.

Abbas Husain Khan v. Ditband Begam, 16 Oudh Cases, 225, referred to 243

Abdul Aziz v. Tafaj-ud-din, 23 Indian Cases, 889, referred to .. 300

Abu Hasan v Ramzan Ali, I. L. R., 4 All., 351, distinguished .. 60

Achal Ram v. Udai Partab Addiya Dat Singh, I. L. R., 10 Calc., 511, discussed 563

Ahmad Ali v Najam-un-nisa, 2 A. L. J., 145, referred to 260

Alderson v White, 2 DeGex and J., 97, referred to 580

Ali Ahmad v Nazran Bibi, I. L. R., 24 All., 542, referred to .. 25

Amlook Chand Farrack v Sarat Chunder Mukerjee, I. L. R., 38 Calc., 913, referred to 25

Anjuman Ara Begam v. Sadik Ali Khan, 2 Oudh Cases, 135, followed .. 661

Appandai Vathiyar v. Bagubali Mudaliyar, I. L. R., 33 Mad., 439, dissented from 421

Ashfaq Ahmad v Wazir Ali, I. L. R., 11 All., 423, referred to .. 547

Ashfaq Ahmad v. Wazir Ali, I. L. R., 14 All., 1, distinguished .. 144

B.

Bachoo Hacksondas v. Mankorebai, I. L. R., 29 Bom., 51, referred to .. 613

Baijnath Singh v. Paltu, I. L. R., 30 All., 125, referred to 158

Balak Puri v. Dunga, I. L. R., 30 All., 49, not followed 114

Baldeo Singh v. Boni Singh, Weekly Notes, 1899, p. 57, followed .. 324

Balkishen Das v. Legge, I. L. R., 22 All., 149, distinguished .. 578

Bansi v. Girdhar Lal, Weekly Notes, 1894, p. 143, followed 140

Begar Ali Khan v. Anjuman Ara Begam, I. L. R., 25 All., 330; L. R., 30 I. A., 94, followed 661

Baroness Wenlock v The River Dee Company, L. R., 19 Q. B. D., 155, referred to 505

Battu Lal v. Bhola Nath, 19 Indian Cases, 119, referred to 260

Bhagwan Sahai v. Bhagwan Din, I. L. R., 12 All., 387, followed .. 570

Bhajan Lal v. Cheda Lal, 13 A. L. J., 825, referred to 209

Bihari Lal v. Daud Husain, I. L. R., 35 All., 240, referred to 397,636

Bilas Kunwar v. Desraj Ranjit Singh, I. L. R., 37 All., 557, followed .. 229

Bishambhar Nath v. Bhullo, I. L. R., 24 All., 98, discussed 226

Brij Indar Bahadur Singh v Ranee Janki Koer, L. R., 5 I. A., 1, distinguished 690

Buddu Singh v. Lalta Singh, I. L. R., 37 All., 604, referred to 425

C.

Casborne v. Scarfe, 1 Atk., 603, distinguished 415

Page.

Chandraka v. Secretary of State for India, I. L. R., 14 Mad., 143, followed 472

Chaudhri Mehdi Hasan v. Muhammad Hasan, I. L. R., 25 All., 439; L.R., 30 I. A., 95, followed 645

Chekatty v. Emperor, I. L. R., 26 Mad., 454, referred to 668

Chetwynd v. Allen, [1899], 1 Ch. D., 803, followed 505

Chhitar Mal v. Jagru Nath Prasad, I. L. R., 28 All., 214, referred to .. 437

D.

Dalip Singh v. Bahadur Ram, I. L. R., 24 All., 448, referred to .. 305

Dalganjan Singh v. Kalika Singh, I. L. R., 22 All., 1, referred to .. 25

Datto Atmaram Hasabnis v. Shankar Dattaraya, I. L. R., 26 Bom., 32, referred to 20

Dag Kuhen v. Badh Prakash, I. L. R., 5 All., 569, referred to .. 120

Dilan Devi v. Zaparerid Begum, I. L. R., 27 All., 440, referred to .. 74

Dharma Vithal v. Govind Sadvalkar, I. L. R., 6 Bom., 99, referred to .. 540

Doorga Persad Singh v. Doorga Konwari, I. L. R., 4 Calc., 190, referred to 620

Dwarka Das v. Kameshar Prasad, I. L. R., 17 All., 68, followed .. 74

E.

Eknath S. Gownde v. Jagannath S. Gownde, I. L. R., 9 Bom., 417, referred to 58

Emperor v. Balibhai Hargovind, 6 Bom. L. R., 517, referred to .. 314

Emperor v. Kallu, I. L. R., 27 All., 92, followed 137

Emperor v. Lalta Prasad, I. L. R., 34 All., 604, referred to .. 174

Emperor v. Mulla, I. L. R., 27 All., 395, referred to 520

F.

Flower v. Lloyd, L. R., 10 Ch., 327, referred to 19

G.

Ganga Singh v. Chedi Lal, I. L. R., 33 All., 800, referred to 26

Gaya Din v. Jhumman Lal, I. L. R., 37 All., 400, principle of, applied .. 20

Gibbens. In the matter of F. W.——, I. L. R., 14 Calc., 42, followed .. 137

Girdhari Marwari v. King-Emperor, 12 C. W. N., 823, referred to .. 178

Gobinda Ram Mandal v. Bhola Nath Bhatto, I. L. R., 16 Calc., 432, referred to 282

Gokul Chand v. Bhika, 12 A. L. J., 387, referred to 209

Gulzari Mal v. Jai Ram, I. L. R., 36 All., 341, referred to 226

Gurdeo Singh v. Chandrika Singh, I. L. R., 26 Calc., 199, dissented from 503

H.

Har Dai Singh v. Lachman Singh, I. L. R., 23 All., 343, dissented from 345

Hemangini Dasi v. Kedarnath Kundu Chowdhry, I. L. R., 15 Calc., 758, distinguished 64

Hiran Bibi v. Baban Bibi, 1 C. W. N., 229, referred to 337

Page.

I

Imrit Konwur v. Roop Narain Singh, 6 C. L. R., 76, referred to .. 686

J.

Jagannath v. Chet Ram, I. L. R., 28 All., 170, referred to 629

Jagjivan Javherdas v. Ghelabai Jiban Chandher, I. L. R., 8 Bom., 17, dissented from 678

Janki Prasad Singh v. Dwarka Prasad Singh, I. L. R., 25 All., 321, distinguished 567

Janki Kuar v. Sarup Ram, I. L. R., 17 All., 59, referred to 331

Jiwan Singh v. King-Emperor, Punj. Rec., 1906, Cr. J., 54, dissented from 518

K.

Kachi Yuva Rangappa Kalakka Thola Udayar v. Kachi Kalyan. Rangappa Kalakka Thola Udayar, I. L. R., 28 Mad., 508, referred to .. 620, 625

Kalian Mal v. Madan Mohan, I. L. R., 17 All., 417, referred to .. 289

Kasturi v. Chiranji Lal, I. L. R., 25 All., 360, referred to 520

Katama Natchiar v. The Raja of Shivaganga, 9 Moo. I. A., 543, referred to 619, 624

Kedar Nath Das v. Hemanta Kumari Debi, 18 C. W. N., 417, referred to 12

Kelly v. Kelly, 6 B. L. R., 71, referred to 620

Khajoorunnissa v. Rowshan Jehan, I. L. R., 2 Calc., 184: L. R., 3 I. A., 224, followed 615

Khoni Lal v. Gobind Krishna Narain, I. L. R., 32 All., 556, referred to 626

King-Emperor v. Fatma Mahomed, Sher Mahomed, I. L. R., 37 Bom., 651 followed 43

King-Emperor v. Jiwan, 27 Indian Cases, 203, referred to 370

King-Emperor v. Raja Mustafa Ali Khan, 8 Oudh Cases, 318, referred to 173

Kishori Mohun Roy v. Ganga Bahu Debi, I. L. R., 23 Calc., 228, distinguished 491

L.

Lakhi Narain Gangulı v. Fekaram Das, 29 C. L. J., 191, dissented from 208

Lala Kanhee Lall v. Mussumat Marki Bibi, 6 C. W. N., 681, not followed 620

Lakshmi Narain Saha v. Nur Ali, I. L. R., 28 Calc., 736, referred to .. 12

Legge v. Ram Baran Singh, I. L. R., 20 All., 56, distinguished .. 121

Lucky Churn Chowdhry v. Badurunnissa, I. L. R., 9 Calc., 627, followed 365

M.

Mahomed Golab v. Mahomed Sultanun, I. L. R., 31 Calc., 612, referred to 11

Mahadei v. Baldeo, I. L. R., 30 All., 76, referred to 699

Mahadeo Singh v. Sheo Karan Singh, I. L. R., 35 All., 481, referred to .. 114

Mahammad Asmat Ali Khan v. Lalli Begum, I. L. R., 8 Calc., 422, referred to 661

Page.

Maharajah Partab Narain Singh v. Maharanee Subhao Koer, I. L. R., 3 Calc., 626, distinguished 537

Mangal Sen v. Rup Chand, I. L. R., 13 All., 324, referred to 429

Manga Ram Chakravarty v. Ganesh Chakravarty, 10 Indian Cases, 383, referred to 230

Mani v. Gauri Sahai, Weekly Notes, 1904, p. 46, referred to.. .. 536

Mathura Prasad v. Dooka, Weekly Notes, 1893, p. 124, followed .. 95

Merryweather v. Nixan, 8 T. R., 186, referred to 289

Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri, I. L. R., 39 Calc., 282, distinguished 257

Mohammad Hamed Ali v. Kaniz Fatima, 13 A. L. J., 140, referred to .. 111

Mohori Bibee v. Dharmodas Ghose, I. L. R., 30 Calc., 539, distinguished 68, 157

Muhammad Allahdad Khan v. Muhammad Ismail Khan, I. L. R., 10 All., 289, referred to 661

Muhammad Sadiq v. Lauta Ram, I. L. R., 33 All., 291, distinguished 250, 252

Muhi-ud-din Ahmad Khan v. Majha Rai, I. L. R., 6 All., 231, referred to 295

Muniya Konan v. Peyumoni Konan, 24 M. L. J., 362, referred to .. 101

Munni Kunwar v. Madan Gopal, I. L. R., 28 All., 63, referred to .. 100

Munshi Mosaful Haq v. Surendra Nath Roy, 10 C. W. N., 1002, referred to 10

N.

Nagar Mal v. Ram Chand, I. L. R., 33 All., 240, distinguished .. 676

Nanda Kumar Howladar v. Ram Jiban Howladar, I. L. R., 41 Calc., 990, referred to 12

Narain Das v. Ram Saran Das, I. L. R., 20 All., 449, referred to .. 209

Narain Prasad v. Munna Lal, I. L. R., 30 All., 329, not followed .. 209

Navakoti Narayana Chetty v. Logalinga Chetty, I. L. R., 33 Mad., 312, distinguished 68

dissented from 160

Nayaganti Achammagaru v. Venkatachalapati Nayaniyaru, I. L. R., 6 Mad., 396, referred to 225

Nemai Chattoraj v. Queen-Empress, I. L. R. 27 Calc., 1041, referred to 602

Noor Mahomad Cassum v. Kaikhosru Manekjee, 4 Bom., L. R., 208, not followed 172, 176

O.

Oman Prasad v. Darbab Shankar, 12 A. L. J., 206, followed 291

P.

Palmer v. Wick and Pulteneytown Steam Shipping Company, [1894] A. C., 318, referred to 389

Parbati v. Bhola Kapri, 20 Indian Cases, 1, followed 539

Parbati Kumari Debi v. Jagadis Chunder Dhabal, I. L. R., 29 Calc., 433, distinguished 507

Phul Kumari v. Ghanshyam Misra, I. L. R., 35 Calc., 202, referred to .. 75

Page.

Powell v The Kempton Park Race Course Company, Limited, [1899] A. C., 143, referred to 43

Q.

Queen-Empress v Abdul Kadir, 21 Indian Cases, 883, referred to .. 468

Queen-Empress v. Abdullah Khan, Weekly Notes, 1898, p 145, followed 295

Queen-Empress v Durga Charran, I L. R., 7 All., 672, followed .. 137

Queen-Empress v. Kangla, I L. R. 23 All., 82, referred to 279

Queen-Empress v Lalit Tewari, I L. R., 21 All., 177, followed .. 137

Queen-Empress v. Maru, I L R. 10 All., 207, dissented from . 50

Queen-Empress v Ramasami, I L R., 12 Mad., 48, referred to . 438

Queen-Empress v Ram Dei, I L R., 18 All., 250, referred to . 607

Queen-Empress v Raja Sundar, I L R., 10 All., 206, referred to .. 607

Queen-Empress v Rayapadayachi, I L. R., 19 Mad., 240, followed ... 518

R.

Raghunath Baksh v Haji Sheesh Muhammad Baksh, 15 Ourh Cases, 115, referred to 66, 160

Raghunath Prasad v Kanhaya Lal, Weekly Notes, 1902, p. 65, referred to 269

Raja Rup Singh v Ram Baksh, I L R, 7 All., 1, referred to .. 613

Raj Kunwar v Indarjit Kunwar, 5 B L. R, 485, referred to .. 686

Rajlakshmi Debee v. Kalipada Dass, I. L. R., 28 Calc., 630, referred to 656

Rajmohun Gossain v. Gourmohun Gossain, 8 Moo. I. A., 91, distinguished 12

Ram Dawar Rai v. Bhugru Rai, 10 A. L J., 538, referred to 103

Ram Gobind v Sri Thakurji Maharaj, 21 A L J., 241, referred to .. 231

Ramsahai Baksh Singh v Dhumpat Das, 24 Ourh Cases, 6, distinguished from 279

Ratnam Ayya v Krishna Dass Vital Dass, I L R., 21 Mad., 454, dissented from 345

Reference under Stamp Act, section 45 (2), I L R, 18 Mad., 220, referred to 59

Reference under Stamp Act, section 46 (2), I. L. R., 12 Mad., 498, distinguished 58

Regina v Samia Kandan, I. L. R., 1 Mad., 173, referred to 607

Rewa Mahton v. Rana Kishen Singh, I. L. R., 14 Calc., 18, referred to .. 242

S.

Sadashiv Rayaji v. Maruti Vithal, I. L. R., 24 Bom., 459, dissented from 102

Sahib Ali v. Subhan Ali, I. L. R., 21 All., 142, referred to 291

Sarju Misir v Bindesri Parshad, 11 A. L. J., 601, referred to .. 636

Sarju Prasad v Mahadeo Pande, I. L. R., 27 All., 449, distinguished .. 428

Sartaj Kuari v. Deoraj Kuari, I. L. R., 10 All., 272, referred to .. 611

Shaikh Bahaluddin v. Baiagak Husain, 12 Indian Cases, 45, referred to 160

Shib Lal v. Bhagwan Das, I. L. R., 11 All., 245, referred to 158

Sia Ram v. Asghar Ali, I. L. R., 26 All., 19, distinguished 288

Shyam Chander Singh v. Baldeo, 10 A. L. J., 522, referred to .. 103

Sorabji Jamsetji v. Ishwardas Jugjiwan Das Store, I. L. R., 20 Bom., 654, followed 350

Page.

Sreee Rajah Yarnmuula Venkayamah v. Sreee Rajah Yarnmuula Boodhu Venkondora, 13 Moo. I. A., 333, referred to 611

Somath Das v. Khetter Mohun Singh, I. L. R., 10 Calc., 693, followed .. 102

Sri Raja Satrucharla Jagannadha Raju v. Sri Raja Satrucharla Ramabhadra Razu, I. L. R., 14 Mad., 237, distinguished 619

Sri Thakurji Maharaj v. Lachmi Narain, 11 A. L. J., 212, referred to .. 245

Subba Rau v. Rama Rau, 3 Mad. H. C. Rep., p. 376, referred to .. 221

Surajbunsee v. Rao Nath Ojha, I. L. R., 30 All., 84; L. R., 35 I. A., 17, followed 451

T.

Tara Kumari v. Chaturbhuj Narayan Singh, I. L. R., 42 Calc., 1170, referred to 615, 622

Thakur Jabri Singh v. Thakur Baldeo Singh, I. L. R., 10 Calc., 792, discussed 503

Tirbeni Sahai v. Muhammad Umar, I. L. R., 23 All., 247, referred to .. 120

U.

Udit Narain v. Jagan Nath, 1 A. L. J., 15, referred to 25

Ujjala Bewa. In the matter of—, 1 C. L. R., 523, referred to .. 279

Ukha v. Daga, I. L. R., 7 Bom., 183, referred to 221

Ulfat Rai v. Gauri Shankar, I. L. R., 33 All., 637, referred to .. 68, 189

V.

Vaghiswara Ayyar v. Siva Subramania Mudaliar, I. L. R., 31 Mad., 66, followed 350

Velayutha Chetty v. Govindaswami Naiken, I. L. R., 30 Mad., 524, referred to 159

Venkata Narumbu Appa Row v. Parthasarathy Appa Row, L. R., 41 I. A., 51, distinguished 610

Venkata Narayana Pillai v. Subbammal, I. L. R., 38 Mad., 405, referred to 114

Venkataramayudu v. Venkataramayya, I. L. R., 15 Mad., 354, distinguished 610

W.

Wahan v. Banke Behari Parshad Singh, I. L. R., 30 Calc., 1021, referred to 320

Webb v. Macpherson, I. L. R., 34 Calc., 57, distinguished 257

Woomatool Fatima Begum v. Meernmunnissa Khanum, 9 W. R., 318, referred to 589

Z.

Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan, I. L. R., 10 All., 166, referred to 242

GENERAL INDEX OF CASES REPORTED IN THIS VOLUME.

Page

ABATEMENT OF SUIT, *See* Hindu law 111

ABETMENT, *See* Act No. XLV of 1860, sections 241, 306, 309 .. 604

ABSCONDING OFFENDER, *See* Criminal Procedure Code, section 512 20

ACKNOWLEDGEMENT, *See* Mahomedan law 627

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 470 AND 471—"Valuable security"—*Forgery—Intent to defraud—Knowing forged signature of executant.*] Two documents were found in the possession of the accused each bearing a signature which purported to be that of one Bindhyachal, but which in fact was a forged signature. One document was intended to be filled up as a promissory note, the other as a receipt, but the space for particulars of the amount, the date and place of execution and the rate of interest were not filled in, a one-anna stamp was affixed to each but it was not cancelled in any way.

Held that these documents, notwithstanding, prima facie, the valuable securities within the meaning of the definition contained in section 30 of the Indian Penal Code. *Queen-Empress v. Ishwarsein*, I. L. R., 12 Mad., 49, referred to

Emperor *v.* Jawahir Thakur 136

——— SECTION 241, See Criminal Procedure Code, sections 4 and 476 3

——— SECTION 353—*Warrant of arrest—Actual resistance necessary.* In order to constitute an offence under section 353 of the Indian Penal Code it is not necessary that any overt act of resistance to a mere ministerial act of arrest sought to be arrested that he would not like to be arrested or that a fight would be the result. There must be positive evidence to show that the officer armed with a warrant and produced the warrant and that the person sought to be arrested resisted such arrest

Emperor *v.* Anjan Bhuiya 136

——— SECTION 353—*Assault to an officer acting judicially—Apprehension for breach of the peace.* An order passed by a Magistrate under section 107 of the Criminal Procedure Code, directing a person to appear before him and show cause why he should not be required to execute a bond for keeping the peace, is an order passed by the Magistrate in his judicial capacity, and a person who assaults the Magistrate while he is passing such an order is guilty of an offence under section 353 of the Indian Penal Code. *Queen-Empress v. Ayyavu*, I. L. R., 12 Mad., 85, followed.

Emperor *v.* Mash Dhan 284

——— SECTIONS 361, 363, 366—*Kidnapping from lawful guardianship—Completion of offence—Continuous offence—Abduction.*] The offence of kidnapping is completed the moment a girl under sixteen years of age is taken out of the custody of her lawful guardian and is not an offence continuing as long

Page.

as the minor is kept out of such guardianship. There can be no abolment of the offence by conduct which commences only after the minor has once been completely taken out of the keeping of the guardian and the guardian's keeping of the minor is completely at an end. *Regina* v. *Sinnie Kaundan*, I. L. R. 1 Mad., 173, *Queen-Empress* v. *Ram Dai*, I. L. R., 18 All., 380, *Queen-Empress* v. *Ram Sundar*, I. L. R., 19 All., 109, *Chedding* v. *Emperor*, I. L. R., 33 Mad., 434, *Nemai Chatterjee* v. *Queen-Empress*, I. L. R., 27 Calc., 1041, *Chanda* v. *Queen-Empress*, Punj. Rec., 1904, Cr. J., 19, referred to.

Emperor v. Abdur Rahman 664

ACTS—1859—XLV—(INDIAN PENAL CODE), SECTION 379, *See* ACT (LOCAL) No. II of 1901, section 124 40

——— ——— SECTIONS 409 and 477A, *See* CRIMINAL PROCEDURE CODE, sections 252(2) and 253 42

——— ——— SECTION 456—*Lurking house trespass—Subjective knowledge with intent to have illicit intercourse with a widow of full age, no offence.*] An accused person, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of a house, cannot be said to have intended either actually or constructively to cause such annoyance.

Where, therefore, it was proved that a person entered a house with intent to have illicit intercourse with a woman who was a widow and adopted, held that he was guilty of no offence. *Jiwan Singh* v. *Emperor*, Punj. Rec., 1903, Cr. J., 54, dissented from. *Emperor* v. *Mulla*, I. L. R., 37 All., 395, referred to. *Queen-Empress* v. *Rayapadayachi*, I. L. R., 10 Mad., 240, followed.

Emperor v. Gaya Bhar 517

——— ——— SECTION 498—*Criminal Procedure Code, sections 4, 198, 288 (3)—Complaint—Statement made in Court as evidence.*] Where in a proceeding instituted by the police under section 366 of the Indian Penal Code, the husband of the woman appeared as a witness and asked the Magistrate trying the case to drop the proceedings under section 366 as he intended to prosecute the accused under section 498 of the said Code, it was held that the statement made by the husband, as a witness, fell within the definition of complaint as defined in section 4, clause *(h)*, of the Code of Criminal Procedure and therefore a conviction under section 498, treating the statement made by the husband as a complaint, was legal. *In the matter of Lyalla Ram*, I. L. R., 522, and *Queen-Empress* v. *Kanyia*, I. L. R., 23 All., 75, referred to.

Emperor v. Bhawani Dat 273

——— ——— 1867—III (PUBLIC GAMBLING ACT), SECTIONS 1 AND 3—*"Place"—Bullock-run of dressed wall surrounded by low wall of loose bricks—"Common gaming house."*] *Held* that the lower end of a bullock-run round which, in the shape of a semi-circle was raised a low wall of loose bricks was a 'place' within the meaning of the Public Gambling Act, 1867. *Kimp-Emperor* v. *Ferioz Mahomed Shiv Mahomed*, I. L. R., 37 Bom., 651, followed. *Powell* v. *The Kempton Park Race-Course Company Limited*, [1899] A. C., 143, referred to.

Emperor v. Mian Din 47

——— ——— 1869—I (OUDH ESTATES ACT), SECTIONS 8 AND 10—*Sanad granted by Government still death of grantee before Act passed into law—Status and rights of grantee—Name of grantee entered in Rule 1 and 2 after his death—Descent by primogeniture—Custom of descent of non-talukdari property acquired by talukdar. A Mahammadan—Burden of proof—Presumption of pre-existing custom—Wajib-ul-arzes, value of.*] On the 17th of October, 1891, J. a Muhammadan

Page.

and the ancestor of the parties to this appeal, received from the British Government a sanad conferring on him the full proprietary right, title and possession of the taluqa of Dargaon, with a condition that in the event "of you or any of your successors dying intestate, the estate shall descend to the nearest male heir, i.e., sons, nephews, etc., according to the rule of primogeniture." He died in 1863, but his name was entered in lists 1 and 2 of those prepared under section 3 of the Oudh Estates Act (I of 1869).

Held, that A had acquired, as declared by section 8 of the Act, a "permanent, heritable and transferable right" in his estate, and was unquestionably a "talukdar" within the meaning of the Act. His death before the Act was passed into law made no difference in his status or in his rights . . . . . .

The provision in section 8, that the lists should be prepared "within six months after the passing of the Act," was clearly meant as a limit for their completion, and not for their alteration.

Descent by primogeniture was not confined to cases coming under list 3. The provision in section 10 that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are talukdars" does not mean that they shall be conclusive merely as to the fact that the persons entered therein are talukdars as defined in section 3, but also that the courts shall regard the insertion of the names in those lists as "conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. *Achal Ram v. Gaia Parsh Adrijan Dat Singh*, I. L. R., 10 Calc., 311; L. R., 11 I. A., 1, and *Thakur Jaha Singh v. Thakur Baldeo Singh*, I. L. R. 10 Calc., 791; L. R., 11 I. A., 136, discussed and explained. *Jo* name could therefore only have been included in list 2 by virtue of a pre-existing custom governing the devolution of the estate to a single heir; and section 10 made that entry conclusive evidence of that fact. . . . . .

The present suit related to property acquired by the son of A who succeeded him, which, it was contended by the appellant (plaintiff), descended not by the custom of lineal primogeniture set up by the respondent (defendant) but in accordance with the ordinary Muhammadan law. . . . . .

Held, that the provision as to conclusive rests in section 10 is confined to estates "within the meaning of the Act," and does not apply to non-talukdari property, but the existence of the pre-existing custom gives rise to a presumption in the case of a family governed by Muhammadan law, which makes no distinction between ancestral and self-acquired property, that it is custom governs the succession to the taluqa. It attaches also to the personal acquisitions of the last owner left by him on his death, and it is for the person who asserts that those properties follow a line of devolution different from that of the taluqa to establish it. *Jawahir Singh v. Durga Pershad Singh*, I. L. R., 26 All., 201; L. R., 31 I. A., 170; *Maharajah Partab Narain Singh v. Maharanee Subhao Koer*, I. L. R., 3 Calc., 126; L. R., 4 I. A., 226, and *Partab Kuar v. Lachmi Pershad Chamdar Dhedal*, I. L. R., 22 Calc., 438; L. R., 22 I. A., 52, distinguished as being cases governed by the Hindu law of the Mitakshara, which recognizes different courses of devolution for ancestral and self-acquired properties . . . . . .

Wajib-ul-arzes which merely narrated traditions and purported to give the history of devolutions in certain families, not even of the ancestor, were held to be most sufficient to rebut the presumption of pre-existing custom.

Murtaza Husain Khan v. Muhammad Yasin Khan .. 652

Page.

ACTS—1869—IV (INDIAN DIVORCE ACT), SECTION 37—*Practice—Alimony—Discretion of Court*: Held that the power to make an order for alimony in favour of the wife after a decree for divorce obtained by the husband on the ground of adultery is discretionary. In a case where there was no suggestion that the husband's conduct had led to the misconduct which led the wife to act under the fear of the consequences, the court refused to exercise its discretion: *Kelly* v *Kelly*, 6 B. L. R. 11, referred to.

McGowan v McGowan 683

——1870—VII (COURT FEES ACT), SECTION 7, CLAUSES V AND X—*Court fee—Suit for specific performance of contract to sell and for possession*: The plaintiffs sued to have it declared that the defendants Nos. 2 and 3 having contracted to sell certain property to whom and received part of the price, thereafter sold the same property to defendant No. 1, who had notice of the agreement with the plaintiffs, and they asked (1) that the defendants Nos. 2 and 3 might be compelled to complete the sale to the plaintiffs and (2) for possession of the property. Held that the suit was really one for specific performance of a contract, and the court fee chargeable was assessable under section 7, clause x. of the Court Fees Act, 1870: *Mahomedan Ahmad Khan* v. *Mayha Bai*, I. L. R. 6 All., 231, referred to.

Nihal Singh v Sheo Ram 292

——1872—1 (INDIAN EVIDENCE ACT), SECTION 70—*Act No XVI of 1908 (Indian Registration Act), section 60 (3)—Admission—Endorsement of registering officer not evidence of admission of execution of document*: The "admission" referred to in section 70 of the Indian Evidence Act is an admission in the course of proceedings in which the attested document is produced, for example, made in the pleadings or by a party himself in his examination. The certificate of execution endorsed by the registering officer upon a document registered by him cannot be treated as an "admission" of execution within the meaning of this section.

Raj Mongal Misr v Mathura Dubain .. .. ..

——SECTION 94—*Mortgage—Construction of document—Mistake in description of property mortgaged—Evidence admissible to show to what property the mortgage was intended to apply*: On the 27th of March, 1884, one H mortgaged 91 biswas of the villages Amdi, Husan Mahfud and Panyala. On the 6th of February, 1879, the mortgagor executed a second mortgage of the villages comprised in the mortgage of the 27th of March, 1884, but by mistake the name of the third village was entered in the schedule of property mortgaged as Halla Jagir instead of Panyala.

Held, that section 94 of the Indian Evidence Act, 1872, did not debar the mortgagees from giving evidence to show that the village of Panyala was intended to be charged by the mortgage of the 6th of February, 1879, the language of the later document so could not be regarded as clear and unambiguous.

Mahabir Prasad v Muzaffar-ullah 101

——SECTION 116—*Landlord and tenant—Denial of landlord's title—Estoppel*: When once a person is the tenant of another person he cannot be allowed to deny that the person whose tenant he was was the owner when the tenancy was created. He can no doubt, admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end, but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property, and this disability is not removed

Page.

by the cessation of the tenancy. *Bhai Kunwar* v. *Desraj Ranjit Singh*, I. L. R., 37 All., 557, followed.

Ganpat Rai v. Multan 220

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 113, *See* Act No. X of 1879, sections 5, 6 and 13 49

——IX (INDIAN CONTRACT ACT), SECTION 74—*Sale—Construction of document—Conditions of sale—Penalty—Vendee not entitled to recover more than provided for by conditions of sale.*] A Town Improvement Trust, having acquired land for the purpose of making a new road, thereafter proceeded to sell sites along the road. Amongst the conditions of sale were that the purchaser was to deposit 10 per cent. of the purchase money immediately on the sale and the balance within nine months. There was a further condition that "if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall be at liberty to resell the lot or lots sold to him either by public auction or by contract." 1

Held, on suit by the Trust against a purchaser who had paid only Re. 1 at the time of his purchase and no more, that the plaintiff was only entitled to recover from the purchaser the 10 per cent. deposit, which was one of the conditions of sale, and not the difference in price resultant on a resale of the property.

The Municipal Board of Allahabad v. Tikandar Jang, 92

——1873—X (INDIAN OATHS ACT), SECTIONS 5, 6 AND 13—*Act No. I of 1872 (Indian Evidence Act), section 118—Evidence—Statement of witness not recorded on oath—Capacity of child of tender years to testify.*] The fact that a court has advisedly refrained from administering an oath to a witness is not sufficient by itself to render the statement of such witness inadmissible. But a court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the court thereof, and if the Court is so satisfied it is best that the Court should comply with the provisions of section 6 of the Indian Oaths Act, in the case of a child, just as in the case of any other witness. *Queen-Empress* v. *Maru*, I. L. R., 10 All., 207, dissented from.

Emperor v. Dhani Ram 40

——————— SECTIONS 8, 9 and 10—*Principal and agent—Agent holding power of attorney to conduct suit for principal—Power of agent to agree to suit being decided according to statement on oath of defendant.*] A lady who was plaintiff in a suit gave to her husband a special power of attorney to conduct the case in her behalf "as he should deem fit." He was authorized to compromise or withdraw the suit, to refer it to arbitration and to nominate arbitrators, and finally the plaintiff said that every step that he might take in the conduct of the case was to be considered as having been taken by herself .. ..

Held, that the husband had power to take action under sections 8, 9 and 10 of the Oaths Act, 1873. *Sadashiv Ramji* v. *Maruti Vithal*, I. L. R., 14 Bom., 455, dissented from.

Wasi-uz-zaman Khan v. Fatta Bibi 191

——1873—XIX (N.-W. P. LAND REVENUE ACT), SECTION 206B. *See* Act No. XVII of 1876, sections 173 and 174 271

——1876—XVII (OUDH LAND REVENUE ACT), SECTIONS 173 AND 174—*Contract entered into by disqualified proprietor creating charge on his property whilst under superintendence of Court of Wards—Liability of property in execution of decree obtained in respect of such contract*

Page

after property has been released—Act No XIX of 1873 (N.-W. P. Land Revenue Act), section 205B, as amended by Act No III of 1879 (United Provinces Court of Wards Act)] Section 174 of the Oudh Land Revenue Act (XVIII of 1876) enacts, with respect to persons whose property is under the superintendence of the Court of Wards, that, "no such person shall be liable to be taken in execution of a decree made by an order of any contract entered into by any such person while his property is under such superintendence."

Held, that the phrase, "while his property is under such superintendence" was inserted to avoid the ambiguity of the verbal expression "contract entered into by such person." Where therefore a contract has been made during such period of time, the effect of the section is to protect the property against attachment in execution of the decree, even after the property has been released from superintendence of the Court of Wards.

The decision to the contrary in *Baraunha Bakhsh Singh v Dhanpal Das*, 14 Oudh Cases, 6, dissented from.

Debi Bakhsh Singh v. Shadi Lal 271

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 27.—*Sale—Suit for specific performance of contract to sell, defendants being vendees under a registered sale deed—Transfer Act No XVI of 1882 (Indian Registration Act), section 50*] The owners of a village which had already been sold at an auction sale in execution of a decree agreed to sell it to the plaintiff, provided that the auction sale should be set aside. The auction sale was set aside, but subsequently the village was sold by means of a registered sale-deed to a third party. *Held*, on suit by the plaintiff for specific performance of the contract to sell to him, that the defendants vendees' registered sale-deed did not take priority over the contract in his favour and that it lay on the defendants to rebut the evidence given by the plaintiff to the effect that the defendants at the time of their purchase were aware of the existence of the contract in favour of the plaintiff.

Ratibat Rao v. Dhunuk Singh 164

——1877—XV—(INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 126, *See Hindu law* 126

——1879—XVIII—[LEGAL PRACTITIONERS ACT), SECTION 14—*Legal practitioner—Prosecution ordered—Certificate not to be cancelled until result of prosecution is known—Pleading*] Where a District Judge, having the alternative to take action against a pleader practising in his judgeship under section 14 of the Legal Practitioners Act, 1879, or to institute criminal proceedings against him, takes the latter, he ought to wait until the result of the criminal proceedings is known before refusing to renew the pleader's certificate.

In the matter of a Pleader 133

——1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 5, 6, 7 AND 127—*Minor—Validity of transfer in favour of a minor*] *Held* that, inasmuch as there is nothing in the law to prevent a minor from becoming a transferee of immovable property, a minor in whose favour a valid deed of sale has been executed is competent to sue for possession of the property conveyed thereby. *Ullat Ram v Gauri Shankar*, I. L. R., 39 All. 057, and *Rajkumari Bakhi v. Haji Sheikh Muhammad Bakir*, 28 Oudh Cases, 115, referred to. *Mohori Bibee v. Dharmodas Ghose*, I. L. R., 30 Calc., 539, and *Ramlotti Narayana Chetty v Logalinga Chetty*, I. L. R., 33 Mad., 412, distinguished.

Kunji Kunwar v. Madan Gopal 69

——1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6—*Compromise of claim to possession of property of deceased person—Such compromise not a transfer of reversionary rights*] Claimed adversely to M the

Page

property left by M's deceased father. The claim was compromised, and B for a consideration of Rs. 5,000 and some immovable property withdrew his claim and recognised the title of M as absolute owner. M died, and the property passed to her husband K, who sold part of it to S.

Held, on suit by S to recover possession of the property so purchased, that the compromise by B of his claim against M was not obnoxious to the prohibition contained in section 6 of the Transfer of Property Act, 1882, as being sale of reversionary rights. *Mohammad Hashmat Ali v. Kunwar Fatima*, 13 All. J., 210, referred to.

Barati Lal v. Sukh Ram 107

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 40 AND 55, *See* MINOR 154

SECTION 55 (4) (b)—*Sale—Vendor's lien—Lien not enforceable against subsequent purchaser without notice*. The vendor's lien for unpaid purchase money provided for by section 55 (4) (b) of the Transfer of Property Act, 1882 cannot be enforced against the property in the hands of subsequent transferees for value without notice of the lien. *Webb v. Macpherson*, I. L. R., 31 Calc., 67, distinguished.

Gur Dayal Singh v. Karnal Singh 254

SECTION 59—*Attestation—Document attested by one witness only—Mortgage—Charge.*] A document purporting to be a deed of mortgage bore the signature of one attesting witness, and the name of another person was written on the margin by the scribe, but there was no signature or mark made by this second person. In a suit brought upon the document after his death it was *held* that the document was not duly attested by two witnesses within the meaning of section 59 of the Transfer of Property Act, inasmuch as there was nothing to show that the person whose name appeared on the document as an attesting witness had authorized the scribe to sign it for him, and therefore it could not also operate as a mortgage nor create a charge on immovable property.

Param Hans v. Randhir Singh * 101

SECTION 90, *See* SUIT TO set aside a decree 7

..... SECTION 95, *See* ACT XIV of 1908, schedule I, articles 134 and 144 188

SECTIONS 105 AND 107—*Agreement to let land on payment of annual rent—Construction of buildings to subsist on agreement—Licence—Remedy of licensee for wrongful eviction.* The defendant's father gave the plaintiffs permission to build a *kuta*, or market place, on a certain plot of land, the latter agreeing to pay Rs 6 per year as annual rent; but no lease was executed. The plaintiffs began to build the *kuta*, but before it was finished they were evicted by the owner of the land. *Held* on suit by the plaintiffs for possession and for an injunction to prevent the defendant from interfering with the *kuta* that the plaintiffs were not lessees, but merely licensees, and that their remedy in any case by way of a suit for damages for the wrongful revocation of their licence.

Basdeo Rai v. Dwarka Ram 176

SECTIONS 123 AND 129—*Gift—Validity of gift of immovable property—Mohammadan law.* Where a Mahommedan had made a gift of immovable property which was valid according to Mohammadan law, it was *held* that the gift was none the less valid because the donor had executed a

Page.

deed of gift purporting to convey the property to the donee, which, owing to a defect in the attestation, was invalid according to the provisions of the Transfer of Property Act, 1882

Karam Ilahi v. Sharf-ud-din 212

ACTS—1882—VI (INDIAN COMPANIES ACT), SECTIONS 61, 125 AND 161—*Company—Winding up—Contributory—Liability of contributory for calls.*] Once a member of a company is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound-up, that is to say, to the extent of his original share held if the company which remains unpaid he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of the winding-up under section 61 of the Indian Companies Act, 1882. He is therefore liable in respect of unpaid calls, even though, as against the company, the realization of such calls may have become barred by limitation. *Sookji Jeevanji v. Ishwardas Jagjiwandas*, I. L. R., 30 Bom., 364, and *Vaidinatha Aiyar v. Sivu Subramania Mudaliar*, I. L. R., 31 Mad., 60, followed.

Jagannath Prasad v. U. P. Flour and Oil Mills Company, Limited 447

——SECTION 109—*Civil Procedure Code*, 1908, *order XXI, rules 58 and 60—Appeal.*] The right of appeal under the provisions of section 109 of Act No. VI of 1882 is co-extensive with the right of appeal conferred by the Code of Civil Procedure.

In the liquidation proceeding of the Indian Exchange Bank a person described as the proprietor of a certain firm was objected to by the Additional Judge of Lahore as a contributory. This order was sent to the District Judge of Ajmer for execution, when another person put in an objection to the effect that he was the sole proprietor of the firm. The District Judge declined to consider this objection

Held, that no appeal lay from the Judge's order, inasmuch as it was under order XXI, rule 30, the objection being under order XXI, rule 58.

Sant Lal v. The Indian Exchange Bank 537

——1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 17—*Civil Procedure Code* (1908), *section 24—Suit transferred from Subordinate Judge with Small Cause Court powers to Munsif—Ex parte decree—Procedure.*] *Held*, that section 24, sub-section 4, of the Code of Civil Procedure contemplates a court vested with the powers of a Court of Small Causes and that when a suit is transferred from that court to another court the court trying it is to be deemed a Court of Small Causes, and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore when such a suit is transferred to a Munsif from the court of a Subordinate Judge vested with Small Cause Court powers and the former passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of the amount as required by section 17 of the Provincial Small Cause Courts Act, the provisions of which are mandatory. *Mangal Sen v. Ray Chand*, I. L. R., 13 All., 324, and *Jagan Nath v. Chet Ram*, I. L. R., 28 All., 470, referred to. *Sarju Prasad v. Mahadeo Pande*, I. L. R., 27 All., 470, distinguished.

Chhotey Lal v. Lekhan Chand Magan Lal 403

Page.

ACTS—1887—IX (Provincial Small Cause Courts Act), section 25—*Revision—Jurisdiction of High Court—Execution of decree—Limitation—Application to court to take a step in aid of execution—Application for extension of time.* A *bond fide* application made by a decree-holder praying for certain relief for the purpose of ascertaining the whereabouts of his judgment-debtor in order to take a step in aid of execution and asking limitation . . . Provincial Small Cause Court, without any materials on the record, arbitrarily assumed that such an application presented by the decree-holder was not *bond fide*, and consequently threw out such application for the execution of the decree was time-barred, it was *held* that there was ground for interference by the High Court in revision.

Bhairon Prasad v. Amina Bibi 693

——1889—VII (Succession Certificate Act—*Certificate granted—Matters to be proved to entitle applicant to a certificate.* A document purporting to be a registered deed of gift executed by a deceased Muhammadan in favour of his wife Radhika Prasad . . . Upon the question whether the said deed of gift had effected a transfer of succession in respect of the estate, it was contended in this court that it was not established that the document had brought about such subsisting title to the note 699

Held, that, whether the assignee of the applicant had a valid title or not, or whether the assignment operated even to pass the title to the applicant, or whether the debt assigned by the promissory note was recoverable or not, were not matters which the court had to determine upon an application for a certificate. The only question in which the court had to decide was whether the applicant was the representative of the person to whom the debt was alleged to have been due 699

Radhika Prasad Bajpai v. Secretary of State for India in Council 699

——1889—VII (Succession Certificate Act), section 4—*Letters of administration—Application of certificate for letters of administration of debt engaged by creditor—Burden of proof.* A decree for possession of certain property and for mesne profits was passed in favour of A and his wife . . . The mesne profits . . . were the debts of the deceased. A obtained letters of administration in respect of the estate of his wife, and then transferred his own right, under the decree, as also those of his wife, to B. B applied for a certificate of the decree. The judgment-debtors appeared and contended that the decree could not be proved without a grant of administration of a succession certificate being obtained by the applicant 474

Held that B could recover the decree without taking out fresh letters of administration.

Per WALSH, J.—A person claiming to recover a debt which was due to the estate of a deceased person must obtain either the effects of the deceased . . . From the time of assignment the debt due to the deceased ceases to be part of the deceased's effects.

The claim contemplated by sub-section 1 of section 4 of the Succession Certificate Act is a claim made by a person in the capacity of, and as a person representative of, a deceased person.

Goswami Sri Manmath Lalji v. Mst. Dai 474

——1890—II (INDIAN STAMP ACT), SCHEDULE 1, *Sch. Art.* (1) (a) No. II—1903, section 17 361

SCHEDULE I, ARTICLE 6—*Sketch—Release—Partition deed.* Two persons, heirs of others claiming the sole right to the property of a deceased person, executed a compromise of their respective claims and gave effect thereto by means of

Page

two deeds of even date, by which deeds each relinquished in favour of the other his (or her) claim to a portion of the estate of the deceased.

Held that these deeds were releases, assessable to ad valorem duty under article 56 of the first schedule to the Indian Stamp Act, 1899. *Pamela S. Gounda* v. *Jayavanta S. Gounda*, I. L. R., 9 Bom., 417, and *Reference under Stamp Act, section 46*, I. L. R., 18 Mad., 385, referred to. *Reference under Stamp Act, section 46*, I. L. R., 12 Mad., 186, distinguished.

Jibun Kunwar v. Golund Das 59

ACTS—1907—III (PRESIDENCY SMALL CAUSE COURTS ACT), SECTION 87—*Insolvent—Effect of bond of conveyancy holding executed should, before filing petition of insolvency*] Section 87 of the Presidency Small Cause Courts Act, 1907, has no application to the case of a bond executed for good consideration by an insolvent shortly before the filing of his petition, unless the object thereof is to give a preference to one creditor over the others. If the bond is found to be a mere conveyance in contemplation, the endowment will not only pass control of the property bonded, it can be avoided and the property placed in the hands of the receiver; otherwise the profits should be paid to the receiver for the benefit of the creditors. The bonded property being an occupancy holding *held* that rents due not vested for dividing the surrender thereof to the zamindar.

Deenajoy Sagar Mal 87

——1908—IX (INDIAN LIMITATION ACT), SECTIONS 5 AND 14, SCHEDULE I, ARTICLE 178, *See* Civil Procedure Code (1908), schedule II, clauses 17 of 3 20 85

——— .. .. SECTION 12, SCHEDULE I, ARTICLE 179—*Limitation—Application for leave to appeal to His Majesty in Council—Exclusion of time required for obtaining a copy of the decree*] *Held* that section 12 of the Indian Limitation Act, 1908, applies to applications for leave to appeal to His Majesty in Council. The appellant is therefore entitled to exclude the day upon which the judgement complained of was pronounced and the time required for obtaining a copy of the decree from the period of limitation prescribed.

Ram Saroop v. Jaswant Rai 82

——— .. .. SECTION 19; SCHEDULE I, ARTICLE 148, *See* Mortgage 540

——— .. .. SCHEDULE I, ARTICLE 62—*Suit for money taken in execution of a decree—Conclusion—Suit for money had and received*] In execution of a decree certain sums due to the judgment-debtor from third persons were attached. Prior to the passing of this decree the judgment-debtor had sold the property to a third party. The decree-holder put the present claim to realise the rents due from the tenants and they were deposited in Court and ultimately paid over to the decree-holder. The purchaser brought the present suit against the decree-holder for the recovery of the money which thus came to the payment to him. *Held* that the suit was for money had and received within the meaning of article 62 of schedule I to the Indian Limitation Act. *Nagappa Amberdas* v. *Gulam Sikan Chandjee*, I. L. R., 8 Bom., 17, distinguished therein.

Kundar Singh v. Ganga Dai 676

——— .. .. SCHEDULE I, ARTICLES 134 AND 144—*Suit for redemption by co-mortgagee—Property originally redeemed, re-mortgaged and finally sold to second mortgagee—Limitation—Act No. IV of 1882 (Transfer of Property Act), section 95*] In 1860 the father of a family redeemed and re-mortgaged certain family property.

Page.

In 1877, after the death of the father, one of the sons again mortgaged the property and with the money borrowed on the second mortgage paid off the first mortgage. The second mortgagee or his son remained in possession of the property as mortgagee until 1898, when the second mortgagor sold it to the son of the second mortgagee. In 1902, a grandson of the original mortgagor sued for redemption of the mortgage of 1860.

Held, that the suit was barred by limitation under article 144 of the first schedule to the Indian Limitation Act, 1908, whatever might have been the position of the members of the family (which was not clear) as regards jointness or separation.

Article 144 does not apply to a person who, being interested in part of a mortgage redeems the whole, such person being merely a charge-holder and not a mortgagee. *Ashfaq Ahmad v. Wazir Ali*, I. L. R., 14 All., 2, distinguished.

Jai Krishan Joshi v. Bodh Sagar Joshi 138

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 135, *See* Mortgage 97

——— SCHEDULE I, ARTICLE 144, *See* Hindu law 117

——— SECTION I, ARTICLE 165 AND 181—CIVIL PROCEDURE CODE (1882), SECTION 47—*Execution of decree—Limitation—Application by judgment-debtor to be restored to possession of immovable property taken by the decree-holder in execution of that decree*.] *Held*, that the application of a judgment-debtor for restoration of immovable property seized by the decree-holder in excess of writ has been treated to one under section 47 of the Code of Civil Procedure and is governed by Article 181 of schedule I to the Indian Limitation Act. *Jaikaran Aggir v. Krishna Dass Vital Dass*, I. L. R., 21 Mad., 494, *Har Dei Singh v. Lachman Singh*, I. L. R., 25 All., 345, dissented from.

Abdul Karim v. Islam-un-nisa Bib. 330

——— SCHEDULE I, ARTICLE 181, *See* Civil Procedure Code (1908), order XXXVI, rule 6 91

——— SCHEDULE I, ARTICLE 182(7), *See* Civil Procedure Code (1908), order XXI, rule 2 204

——— XVI (INDIAN RELIEF ACT), SECTION 17, *See* Civil Procedure Code (1908), order XXIII, rule 3 75

——— SECTION 17 AND 19—*Registration—Petition to Revenue Court to mutation proceedings—Compromise—Family settlement*.] A separated Hindu executed two mortgages in favour of the plaintiff, and then died leaving a widow and daughter. The widow held possession for her life-time and executed a third mortgage. She died. Her daughter had claim to the estate and applied for entry of her name in the revenue records. M, one of the reversioners, contested her application, urging that her father was joint with him and not separate. The parties came to terms orally. The daughter agreed to give up her claim, if, in return, agreed to take the estate, to pay off the mortgages and to pay a portion over to the daughter. They two then filed a joint petition in which it was stated that the parties had come to terms. This statement in the petition was followed by another on behalf of the daughter that she had given up her claim to the estate absolutely on condition of mutation of names being made in favour of M. The Revenue Court's order was that mutation was to be made accordingly on the compromise. M, to secure to the daughter the payment of the money which he had

Page.

promised to pay, executed two bonds in favour of her sister's husband, but she never realized the money due thereon, on the contrary he managed to get the bonds back and kept them. Some time afterwards the daughter sued to recover possession of the property in dispute

Held that in the circumstances the plaintiff was entitled to a decree conditional on her paying the amount due on the mortgages.

Jagrani v. Bishesher Dube 360

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 50, *See* Act No. I of 1877, Section 27 184

——————————————SECTION 50, *See* Act No. I of 1872, section 70 1

——1908—XVI (INDIAN REGISTRATION ACT), SECTIONS 82 AND 83—*Prosecution of registration officer—A voluntary preliminary to a prosecution] Held* that the prosecution contemplated in section 83 of the Indian Registration Act, 1908, is a criminal prosecution precedent to the prosecution of any registering officer mentioned in section 82 of the Act. *King-Emperor v. Ahsan*, 10 Indian Cases, 203, referred to.

Emperor v. Hussain Khan 304

——1913—VII (INDIAN COMPANIES ACT), SECTION 207—*Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction.*] A decree had been obtained against a company which was subject to the passing of the decree went into voluntary liquidation. The decree holder applied for execution to the district which was transferred by the court of first instance. On appeal the District Judge ordered stay of execution. *Held* that the District Judge had no jurisdiction to stay execution. Under the Indian Companies Act the only court that could stay execution was the High Court.

Held, further, that section 207 of the Indian Companies Act is no bar by itself to the progress of execution proceedings and until an order has been obtained from a court having jurisdiction under the Companies Act, either for winding up or for stay of proceedings

Suraj Bhan v. Agra Boot and Equipment Factory, Agra .. 407

——(LOCAL)—1900—I (N.-W. P. AND OUDH MUNICIPALITIES ACT), SECTION 131—*Breach of rule made under clause (p) of section 130—Notice.*] In order to render a person liable to punishment for breach of a rule made under clause (*p*) of section 130 of the Municipalities Act (Local I of 1900), by reason of the commencement of sale or exposure for sale of certain specified articles upon any premises which were at the time of the making of such rules used for such purpose, it is necessary that six months' notice in writing should have been served upon him in the manner provided by law; and conviction in the absence of such notice is bad in law.

Emperor v. Ghasseeun 495

——(LOCAL)—1901—I (AGRA TENANCY ACT), SECTION 22—*Occupancy holding—Female in possession as such of occupancy holding—Succession.*] There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed, beyond the ordinary estate of a Hindu female. The Act not having provided for the devolution of the interest in an occupancy holding where it was, at the passing of the Act, in the possession of a Hindu female as such, the rights of the parties, claiming such holding on the death of the last female occupant must be ascertained according to the ordinary Hindu Law.

Bishesher Ahir v. Dukhanu Ahir 187

Page.

ACTS—(Local)—1901—II (Agra Tenancy Act), section 22—*Occupancy Holding—Succession—Holding owned by a joint Hindu family*.] An occupancy holding owned by a joint Hindu family does not devolve at the death of the last surviving member of the joint family on that member's widow

Mahabir Singh, v. Bhagwanti 326

——SECTIONS 58 AND 177 (e)—

Suit for ejectment—Question of proprietary title—Appeal—Jurisdiction.] In a suit for ejectment under section 58 of the Tenancy Act defendant denied the plaintiff's title and set up another man as his landlord. The court of first instance decreed the claim.

Held, that no appeal from this decision lay to the District Judge under section 177 (e) of the Act, inasmuch as the question of the plaintiff's proprietary title was put in issue in the court of first instance and was a matter in issue in the appeal.

Ganga Prasad v. Hari Narain 405

——SECTION 124—*Distress—Attachment—Removal by tenants of distrained crops—Theft—Act No XLV of 1860 (Indian Penal Code), section 379*.] A distress legally carried out according to the provisions of the Agra Tenancy Act, 1901, takes priority over the rights of a decree-holder who has attached the crops distrained, and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants.

When, therefore, certain cultivators acting under section 124 (1) of the Agra Tenancy Act, cut and stored certain crops which had been distrained by their landlord, but which had also been previously attached by a decree-holder, it was *Held* that they had committed no offence.

Emperor v. Khan Dayal 40

——SECTION 164—*Suit against lambardar for profits—Sir and khudkasht land held by co-sharers to be taken into account*.] *Held* that in a suit for profits brought by a co-sharer against a lambardar under section 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have taken into account the profits of *sir* and *khudkasht* and held by the other co-sharers in the village *Bishambhar Nath* v. *Baldeo*, I. L. R., 24 All., 98, discussed. *Gulzari Mal* v *Jai Ram*, I. L. R. 30 All., 447, referred to

Ganga Singh v. Ram Sarup 223

——SECTION 164—*Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi*.] *Held* that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Courts of Revenue under section 164 of the Agra Tenancy Act, 1901. *Baldeo Singh* v. *Bens Singh*, Weekly Notes, 1899, p. 57, referred to

Digbijai Singh v. Hira Devi 342

——SECTIONS 182 AND 183—

Suit for rent—Second Appeal to District Judge—Remand—Appeal—Civil Procedure Code (1908), order XLI, rule 23.] *Held* that no appeal lies from an order of remand under order XLI, rule 23, of the Code of Civil Procedure made by a District Judge in an appeal in a suit for rent under section 180, clause (2), of the Agra Tenancy Act, 1901.

Gulzari Lal v. Latif Hussain 181

Page.

ACTS—(LOCAL)—1901—II (AGRA TENANCY ACT). SECTION 202—*Remand—Effect of Revenue Court decision on question of tenancy on a former suit, on a subsequent suit in a Civil Court for ejectment as trespasser.*] Defendants were tenants of one *D* *D*. took proceedings in the Revenue Courts to eject them as tenants at will. The Assistant Collector dismissed the suit, but the Commissioner allowed the appeal. The Board of Revenue, however, on a second appeal dismissed the suit. *D* in the meantime had executed the decree passed by the Commissioner and obtained possession. Upon the decree passed by the Board of Revenue in their favour the defendants made an application to be restored to possession, but it was rejected as time-barred. *D* then brought the present suit to eject the defendants as trespassers alleging that he had been in possession of the land as his *khudkasht*; that the defendants had entered into forcible possession, and that the effect of the Revenue Court proceedings was to extinguish the tenancy. The defendants pleaded that the tenancy subsisted. The court of first instance decided that the tenancy was subsisting, but granted to the plaintiff damages for forcible dispossession. The lower appellate court remanded the case to the trial court with directions to act in accordance with the provisions of section 202 of the Agra Tenancy Act. *Held*, that the order was the proper one to make in the circumstances of the case, and the question whether by reason of the events that had happened since the decision of the Board of Revenue the tenancy was extinguished or not was one which the Revenue Courts were competent to decide. *Mahadev Ganesh Sahni*, Weekly Notes, 1904, p. 46, and *Satya Misri v. Bindeshri Pershad*, 12 A. L. J., 691, referred to.

Bhawan v. Midan Mohan Lal 583

——(LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 56, 93—*Cess—Rent—Rent payable partly in cash and partly in kind.*] Certain tenants holding under *gabuliat* agreed to pay as rent a fixed sum in money and also certain quantities yearly of *bhusa*, *chari*, grain and sugarcane described in the *gabuliat* as *rasum zamindars*.

Held that, notwithstanding that the payments in kind were described as "*rasum zamindari*," they were nevertheless part of the rent and could be recovered by the lessor, and did not fall within the purview of section 93 of section 56 of the United Provinces Land Revenue Act, 1901 *Sri Ram v. Asghar Ali*, 1 L. R., 25 All., 19, distinguished.

Rang Lal v. Jasu 296

——SECTIONS 110, 112 AND 113—*Partition—Question of proprietary title.*] One of the co-sharers in a village applied in a Court of Revenue for partition, whereupon another of the co-sharers raised the objection that the village had already been partitioned privately and could not again be divided.

Held, that this objection raised a question of proprietary title in respect of which the Court of Revenue had jurisdiction to refer the parties to the Civil Court.

Ram Narain v. Jagan Nath Prasad 115

——SECTION 114 (1) (*b*)—*Partition—Non-applicant required to file suit in Civil Court—Non-compliance and order—Appeal.*] A Collector trying a partition ex-made an order under section 114 (1) (*b*) of the United Provinces Land Revenue Act, 1901, against the non-applicants. He failed to comply with this order, but alleged that in a civil suit between the parties to the partition case it had been decided in respect of certain non-revenue-paying property that both sides were members of a joint Hindu family.

Page.

The Collector, however, overruled his objection, finding that the ruling did not apply to revenue paying property.

Held that no appeal lay to the District Judge from this order.

Har Prasad v. Mukund Lal 70

ACTS—(LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 111, 112, 243 (*b*)—*Civil Procedure Code* (1908), *section 11, order II, rule 2—Partition—Suit for possession of property, the subject of partition*; A person who was legally entitled to one half of a four biswa shamilat share, but was recorded only in respect of a 3½ biswa share applied for partition of this latter share. After the date fixed for filing objections the person who was recorded in respect of the remaining one-fourth biswa share came in and sued for partition of that one-fourth biswa share. The partition was completed, but subsequently the original applicant to court sued to recover the one-fourth biswa share.

Held that the suit was not barred by section 243 (*b*) of the United Provinces Land Revenue Act (III of 1901), neither was it barred by order II, rule 2, of the Code of Civil Procedure, inasmuch as that rule did not apply to proceedings under the Land Revenue Act, nor by the rule of *res judicata*.

Kaika Prasad v. Mannoohan Lal 304

SECTION 243, CLAUSE (*b*)—*Civil and Revenue Courts—Jurisdiction—Partition—Land of a third party alleged to be wrongly included in a plot formed by imperfect partition—Suit for recovery of possession in Civil Court*; Where land belonging to one party was, apparently by mistake, and without notice to the person who claimed to be the rightful owner thereof, included in another party's land under the subject of an imperfect partition, it was *held* that the person who claimed to be the owner of the land so dealt with was not debarred by section 243 (*b*) of the United Provinces Land Revenue Act, 1901, from suing in the Civil Court to have his right to the land declared and to recover possession thereof. *Muhammad Sadiq v. Lauta Ram*, I. L. R., 23 All., 20, distinguished.

Quære whether section 243 (*b*) of the United Provinces Land Revenue Act, 1901, applies at all to an imperfect partition.

Shambhu Singh v. Dayal Singh 243

——(LOCAL)—1903—II (ENCUMBERED ESTATES ACT), SECTION 17—*Mortgage deed executed by Collector—Stamp—Act No. II of 1899 (Indian Stamp Act), section 3—Held* that a mortgage executed by a Collector under the provisions of section 17 of the Encumbered Estates Act, 1903, is not exempt from stamp duty.

Somvanshi v. Mota Bai 351

ADMISSION, *See* Act No. I of 1872, section 70 1

ADVERSE POSSESSION, *See* Mortgage 311

ALIMONY, *See* Act No. IV of 1869, section 37 288

ANCESTRAL PROPERTY, *See* Civil Procedure Code (1908), order XXI, rule 66 481

APPEAL, *See* Act No. VI of 1882, section 109 137

——*See* Act (Local) No. II of 1901, sections 66 and 177 (*c*) 365

——*See* Act (Local) No. III of 1901, sections 182 and 183 181

——*See* Act (Local) No. III of 1901, section 111 (*b*) (*ii*) 70

——*See* Civil Procedure Code (1908), section 104 (*f*) 380

——*See* Civil Procedure Code (1908), order IX, rule 12 307

Page.

APPEAL, *See* Civil Procedure Code (1908), schedule II, paragraph 21; order XLIII, rule 1 297

——*See* Criminal Procedure Code, section 250 393

——by Defendant and admission by him during hearing of appeal of his want of title, *See* Title, suit for declaration of 449

——to His Majesty in Council, *See* Act No. IX of 1908 (Indian Limitation Act), section 12; schedule I, article 179 82

——to His Majesty in Council, *See* Civil Procedure Code (1908), section 109 159

——to His Majesty in Council, *See* Civil Procedure Code (1908), section 109 163

——to His Majesty in Council, *See* Civil Procedure Code (1908), section 110 488

——*See* Criminal Procedure Code, sections 403 and 413 393

APPLICATION by judgement-debtor to be restored to possession of immovable property taken by the decree-holder in course of suit decreed, *See* Act No. IX of 1908, schedule I, articles 166 and 181 .. 339

——to file amended plaint without the intervention of the court, *See* Civil Procedure Code (1908), section 151 (*f*) 339

——to set aside a sale by person claiming to be the real owner, *See* Civil Procedure Code (1908), order XXI, rule 89 353

ARBITRATION, *See* Civil Procedure Code (1908), section 104 (*f*) .. 520

——*See* Civil Procedure Code (1908), schedule II, clauses 17 and 20 .. 93

——*See* Civil Procedure Code (1908), schedule II, paragraph 21, order XLIII, rule 1 297

ARREST, *See* Act No. XLV of 1860, section 355B 506

ASSIGNEE, rights of, *See* Act No. VII of 1899, section 4 474

ASSIGNMENT of debt by holder of letters of administration, *See* Act No. VII of 1889, section 4 474

ATTACHMENT, *See* Act (Local) No. II of 1901, section 124 40

ATTESTATION, *See* Act No. IV of 1882, section 59 461

BANDHU, *See* Hindu Law 410

BENAMI TRANSACTION, *See* Second Appeal 122

BENGAL REGULATIONS, *See* Regulations

BEQUEST of whole estate to one person on condition, *See* Hindu Law .. 446

——of portion of estate to different legatee, *See* Hindu Law .. 446

BREACH of rule made under clause (*a*) of section 180, *See* Act (Local) No. I of 1900, section 182 455

BURDEN OF PROOF, *See* Act No. I of 1872, sections 8 and 10 .. 532

——————*See* Mortgage 540

CAUSE OF ACTION, *See* Civil Procedure Code (1908), order II, rule 2 .. 217

——————*See* Decree for possession 509

CERTIFICATE OF SUCCESSION, *See* Civil Procedure Code (1908), section 180 158

CESS, *See* Act (Local) No. III of 1901, sections 56, 58 286

CHARGE, *See* Act No. IV of 1882, section 59 461

——*See* Criminal Procedure Code, sections 222 (2) and 238 42

CIVIL AND REVENUE COURT (Jurisdiction), *See* Act (Local) No. II of 1901, section 204 328

Page

CIVIL AND REVENUE COURT (Jurisdiction). *See* Act (Local) No III of 1901, section 233, clause (b) 213

CIVIL COURTS, General rules or practice for, chapter IV, rule 9. *See* Civil Procedure Code (1908), order XXX, rule 10 481

CIVIL PROCEDURE CODE (1877), SECTION 564—*Decree for redemption entered on appeal—Restitution—Introduction of claim to a fresh application for restitution of mesne profits which were not given by appellate court decree—Suit to recover*.—A mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge, under which, on payment of the sum decreed to the mortgagee, he was put in possession of the mortgaged property, but the mortgagee appealed to the High Court, which increased the amount payable on redemption by a sum which the mortgagor failed to pay, and the mortgagee thereupon applied to the Subordinate Judge for costs so decreed and for mesne profits for the period during which he had been out of possession.

Held (upholding the decisions of the courts in India) that the Subordinate Judge had power under section 564 of the Code of Civil Procedure, 1877, to award mesne profits, although they had not been expressly given by the decree of the High Court.—If the decree was wrong the parties aggrieved had their remedy either by appeal to the High Court or, by an application for review. The proceedings taken under the decree of the Subordinate Judge, culminating in the sale at which the mortgagee purported to purchase, the equity of redemption, were valid, and the appellant, on assignee of the rights of the mortgagor, was held not entitled to set aside

Prabhu Dayal v. Makhan Ahmad 173

.. .. .. SECTION 211, ORDER IV, RULE 2. *See* Act (Local) No III of 1901, sections 111, 112, 233 (*b*) 204

.. .. .. (1908), SECTION 24. *See* Act No IX of 1908, section 17 425

.. .. .. —47. *See* Act No IX of 1908, schedule I, articles 2(6) and 181 339

.. .. .. *Section 47(1)—Arbitration—Application to file an award in the suit in which a decree has been passed in the suit—Appeal—Duties of mortgagee—Right of appeal*.—No appeal lies from an order declaring the filing of an award in an arbitration without the intervention of the Court.

Held, further, that in an arbitration proceeding if the parties come to terms on a certain point it does not debar the arbitrator from passing judgment on that point incorporating the terms of the compromise in the award.

Hari Kumar v. Lekhen Ram Jain 380

.. .. SECTION 109, CLAUSE (*a*), ORDER XLI, RULE 23—*Appeal to His Majesty in Council—"Final order"—Order of remand which decides finally only one issue out of several*.—*Held*, that an order of remand made by the High Court which decided finally only one issue out of several which were raised by the proceedings before the court of first instance, which were proceedings under rule 17 of the second schedule to the Code of Civil Procedure, was not a "final order" within the meaning of section 109, clause (*a*), of the Code.

Nuri Miah v. The Ganges Sugar Works, Limited 139

.. .. .. SECTION 133—*Appeal to His Majesty in Council—"Substantial question of law"—Practice of Letter of certificate under the Succession Certificate Act, 1889*.] *Held* that the nature of the legal position of a person who has collected debts

Page

of a deceased person by virtue of his being the holder of a succession certificate granted under the provisions of the Succession Certificate Act, 1889, is a substantial question of law such as would support the granting of special leave to appeal to His Majesty in Council

Nijm-un-nisa Bibi v. Amina Bibi 188

CIVIL PROCEDURE CODE (1908), SECTION 110—*Appeal to Privy Council—Valuation of appeal—Appealable amount subject-matter of appeal—Suit to enforce mortgage—Person made defendant not asserting adverse claim on the mortgaged property—Appeal on question of his claim by High Court.*] In a suit to enforce a mortgage for Rs. 15,000, the amount due upon which was Rs. 33,000, the mortgagee (respondent) asked for payment or for a sale of the mortgaged property. Besides the parties who claimed under the mortgagor the appellant, who set up an adverse claim to a portion of the mortgaged property, and the person through whom she did so were made defendants and they alone defended the suit. The Subordinate Judge allowed a moiety of her claim, but on appeal the High Court held that she had no title to any of the property. The High Court granted her leave to appeal to His Majesty in Council under section 110 of the Civil Procedure Code, 1908, on the ground that as the mortgaged land was imposed on the property a liability for Rs. 33,000 the subject-matter of the appeal was a sum exceeding Rs. 10,000

Held by the Judicial Committee (on a preliminary objection that the appeal was not maintainable as the subject-matter of it was below the appealable value), that as between the respondent seeking to enforce his mortgage and the appellant it was quite immaterial what the amount of the mortgage was, and that the subject-matter in dispute was not the Rs. 33,000 but simply the value of the property the appellant claimed, which was not shown to be of the amount prescribed by section 110 of the Civil Procedure Code, 1908

Radha Kishen v. Rooh Singh 486

——————SECTION 115, *See* Criminal Procedure Code, section 476 695

——————SECTION 144—*Execution of decree—Decree reversed on appeal—Bona fide auction purchaser under original decree.*] Restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bona fide* purchaser for value at an auction sale held by a court which had jurisdiction to hold the same. *Rawa Mahton* v. *Ram Kishen Singh*, 7 C. L. R. 14 *Chandi Kant-al-alum Khan* v. *Muhammad Asghar Ali Khan*, 7 C. L. R. 10 (*Note*), 160, and *Akbar Hussain Khan* v. *Dilkandi Begum*, 10 Ordh Cases, 235, referred to

Ram Lal v. Hamidun-nissa Bibi 240

——————SECTION 145, ORDER XXXV, RULE 14—*Execution of decree—Security for default of judgment-debtor—Mode of enforcement of security.*] On attachment of certain property under a decree by a decree-holder a third party and the latter claiming the attached property as his own but subsequently entered into a compromise with the decree-holder whereby he made himself responsible for payment of the decretal amount and executed a security bond in which, in addition to undertaking a personal liability for the judgment-debtor's default, he hypothecated certain property. *Held* that, default having been made by the judgment-debtor, decree-holder was at liberty to enforce the security in the manner provided for by section 145 of the Code of Civil Procedure, and that under ORDER XXXIV, RULE 14, was no bar to his enforcing it against the hypothecated property as well as any other

Page.

property of the surety. *Jaikri Koer* v. *Sarup Rai*, I. L. R., 17 All., 201, referred to

Mahtu Prasad v. Mahadeo Prasad 327

CIVIL PROCEDURE CODE (Act XIV of 1882), ORDER IV, RULE 2—*Parties—Separate suits for property in different villages—Cause of action.* The plaintiff as member of a joint Hindu family brought a suit for a certain share of certain property in the district of Saharanpur. He asserted that he was not in possession of the property, and prayed an adverse court for certain plants. The suit was settled by a compromise.

Subsequently the plaintiff brought a separate suit in Allahabad for possession of some of the property, alleging that he was in actual possession and had been so for more than twelve years, and that the defendant had recently dispossessed him. The defendant pleaded that the plaintiff's cause of action was identical with that in the former suit, and that the Allahabad Court had no jurisdiction to entertain the suit.

Held that the question of the Allahabad Court's jurisdiction to entertain the suit depended upon the plaint as it stood, and that the cause of action alleged in the plaint was not identical with that in the former suit. Section 17 of the Code of Civil Procedure *Mian Amir Chakravarty* v. *Gaya Ji Chakravarty*, 10 Indian Cases, 83, *Chhe* v. *Daga*, I. L. R., 7 Calc., 184, and *Sukhi Ram* v. *Ramu Ram*, 8 Mad. H. C. Rep., p. 270, referred to.

Ram Lakhi v. Ram Lal 367

——— ——— ORDER IX, RULE 2—*Dismissal of suit—Appeal.* Held on appeal that a dismissal under Chapter XXII under order IX, rule 2 of the Code of Civil Procedure on the ground that summons had not been served on the defendants in consequence of the failure of the plaintiff to pay certain process-fees could not for such service. *Lucky Chand (Shankley* v. *Ruttonjee)*, I. L. R., 9 Calc., 627, *Parlati* v. *Tool*, 20 Indian Cases, 1, followed.

Lachmi Narain v. Lachmi Lal 357

——— ——— ORDER XI, RULE 21—*Procedure—Plaintiff under no power of appeal against the minor actions in the matter of costs—Discovery of facts.* Where a plaint had been given the costs wrongly awarded to the defendant but was stopped out of the way documents which would have helped him to the subject matter of the suit, but the result had been no order under for discovery or inspection of documents, it was *held* that the court was not justified in dismissing the suit, purporting to act under order XI, rule 21, of the Code of Civil Procedure.

Richard Lal v. Sultan Singh .. .. ..

——— ——— ORDER XXI, RULE 2—*Execution of decree—Decree payable by instalments—Payment of instalments not certified—Limitation—Act XV (1877) of the Indian Limitation Act), schedule II, article 179 (4).* The Code (order XXI, rule 2) is that a payment made on account of a decree, and not certified to the court executing the decree cannot be recognized by that court for any purpose. Where no order upon its had been made regarding the payment of an instalment decree but such payments were not certified to the court executing the decree it was *held* that Limitation ran against the decree-holder from the date upon which the first instalment was due.

"Certified" is recorded" within the meaning of order XXI, rule 2, sign by Court the execution court having satisfied by either the decree-holder or a judgment-debtor that a certain payment has been made in respect of decree has recorded the fact on the

Page.

execution file *Gokal Chand* v. *Bihla*, 12 A. L. J., 367, and *Bhajan Lal* v. *Chida Lal*, 12 A. L. J., 525, referred to. *Lekhi Narain Gurgani* v. *Fakhruni Das*, 30 C. L. J., 131, distinguished from.

Chattar Singh v. Amir Singh 204

CIVIL PROCEDURE CODE (1908), SECTION XXI, RULE 16—*Execution of decree—Res judicata.*] On application by a person to have his name substituted as judgment-debtor upon the ground that he was in fact the true owner of the decree, an order was passed, after notice to the judgment-debtor, permitting the applicant to execute the decree as its transferee. *Held* on application for execution of the decree that the judgment-debtor was not entitled again to raise the question of the validity of the transfer of the decree to the applicant. *Oman Prasad* v. *Daulat Singh*, 12 A. L. J., 350, followed.

Tej Singh v. Jugan Lal 250

——— SECTION XXI, RULE 18—*Cross-decree—Set off—Decree for costs on mortgage against purchaser of portion of the mortgaged property—Personal decree for money—Is he not before the same decree?*] A person against whom a decree for resisting his right to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgement-debtor by the arrest of his person and the attachment of his property. In the case where he has obtained his decree for costs in his individual and personal capacity in the other he is not ordered to pay any sum of money in his individual and personal capacity but is only given an option to do so if he likes to save from sale some property in which he is interested. In such circumstances, therefore, rule 18 of order XXI of the Code of Civil Procedure will not be applicable. *Nagar Mal* v. *Ram Chand*, I. L. R., 31 All., 442, distinguished.

Sheo Shankar v. Chhotu Lal 669

——— ORDER XXI, RULES 58 AND 63, *See Act No VI of 1882, section 259* 537

——— ORDER XXI, RULE 63—*Execution of decree—Suit for declaration that property is not liable to attachment and sale—Valuation of suit.*] *Held* that in a suit for a declaration that property was not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but the amount for which the decree may be executed. *Durga Das* v. *Kameshar Pearsi*, I. L. R., 17 All., 49, and *Digbi Das* v. *Rameswari Begam*, I. L. R., 27 All., 440, followed. *Jeoti Kunwari* v. *Ghanshyam Misra*, I. L. R., 36 Calc., 426, referred to.

Khoda v. Mumtaz Begam 72

——— ORDER XXI, RULE 66—*Execution of decree—Attached property—General rules of practice for civil courts, chapter IV, rule 6.*] Property to which title is made out by suit is not property which at the time of the passing of rule 6, chapter IV, of the General Rules of Practice for the Civil Courts and such property is consequently not executed.

Fazl Ahmad v. Wesal-ul-din 491

——— ORDER XXI, ORDER 90—*Sale in execution of a decree—Application to set aside a sale by person claiming to be the real owner.*] Where immovable property has been sold in execution of a decree against the ostensible owner, a person claiming

Page.

to be the real owner is not competent to ask the court to set aside the sale under order XXI, rule 89, of the Code of Civil Procedure *Akbal Ahir* v. *Tufajjal Hus*, 27 Indian Cases, 830, referred to.

Hardwari Lal v. Amanullah Khan 263

CIVIL PROCEDURE CODE, 1908, ORDER XXXII, RULE 8—*Compromise—Persons of unsound mind not a party to the original suit—Procedure—Act No XIV of 1908 (Indian Limitation Act), section 17.* In a suit for a declaration that it is to obtain a release of property by the plaintiff applied to the court stating that the said land from a compromise an application for a decree in the terms under order XXXII, rule 3, of the Code of Civil Procedure

In support of this application he filed a copy of a petition which had been presented shortly before by both parties to the Revenue Court in proof. There for the purpose of giving effect to the compromise property as was in the decision in the Civil Court, and which set forth that the matter had been the same Court had been compromised on the terms that the suit. The petition had been accepted and action upon by the Revenue Court:

Held, that the petition could not be in the Civil Court that the matter in dispute between the parties had been adjusted out of court, and that it did not pertain to the registered.

Sital Prasad v. Gobind Prasad 75

CIVIL PROCEDURE CODE, 1908, ORDER XXXIII, RULES 10 AND 11—*Stamp duty on a grant to a pauper—Order for less than the amount claimed—Interest on the decretal amount—Costs.* In a suit brought on the 4th August, 1910, the plaintiff sued for Rs. 1,000 and Rs. 1,000 as interest on the bond. The lower court ordered the defendant to pay the plaintiff Rs. 1,000 and interest incurred by the plaintiff including the amount of court-fee which could have been payable on the plaint. *Held*, that the court was not bound, on the plaint should be supposed but for the purpose of rules 10 and 11 of order XXXIII of the Code of Civil Procedure. *Chandra* v. *Secretary of State for India*, I. L. R., 34 Mad., 109, followed.

Ganga Dayal Rai v. Mst. Imrati Chaun 469

CIVIL PROCEDURE CODE, 1908, ORDER XXXIV, RULES 4 AND 6—*Mortgage—Puisne mortgagee—Power of court to pass judgment allowing redemption of prior mortgage—Right of puisne mortgagee on redemption to a decree absolute for sale of the property comprised in both mortgages.* In a suit by the 1st puisne mortgagee the puisne mortgagee sued the plaintiff's right to redeem a prior mortgage covering other property as well as that included in the mortgage in suit. The preliminary decree did not, however, specify the property as property which the mortgagee plaintiff was entitled, in the event of non-payment, to bring to sale:

Held that the plaintiff-mortgagee, having not paid the amount due on the prior mortgage, was entitled, on application to that effect, to a final decree for sale of the property comprised in both mortgages.

Udhishter Singh v. Kunaili 986

CIVIL PROCEDURE CODE, 1908, ORDER XXXIV, RULE 6—*Application for decree absolute for sale on a mortgage—Limitation.* A suit to which the Indian Limitation Act, 1908 (Indian Limitation Act), No IX of 1908, applies, is not governed by article 181 of the Schedule to the Indian Limitation Act, 1908. An application under order XXXIV, rule 6 (2), of the Code of Civil Procedure (1908), is an application in the same suit and not an application for execution, and is governed by article 181 of the Schedule to the Indian Limitation Act, 1908. *Bodhan* v. *Shankar Dattatraya*, I. L. R., 34 Bom., 32. *Ambeh Gauri Parvatabai Sonal Chandra Mukerjee*, I. L. R., 38 Calc., 913,

Page

Ali Ahmad v. Nasiban Bibi, I. L. R., 24 All., 542, and *Ujit Narain v. Jayan Nath*, I. A. L. J., 15, referred to.

The right to make such an application accrues on the date when the time limited by the preliminary decree expires, unless such time has been extended by a court of appeal. The principle of the decision in *Gaya Din v. Bhawanian Lal*, I. L. R., 27 All., 109, applied

Macho Ram v. Nihal Singh 21

CIVIL PROCEDURE CODE (1908), ORDER XLI, RULE 23, *See* Act (Local) No II of 1901, sections 182 and 183 161

——— ORDER XLI, RULE 27—*Additional evidence called for by Appellate court—Re-examination of witness already examined before the court of first instance*. *Held* that under order XLI, rule 27, of the Code of Civil Procedure, there is no bar to the re-examination on appellate court to recall and re-examine a witness who has already been examined and cross-examined before the court of first instance

Muhammad Siddiq v. Mahmud-un-nissa Bibi 191

——— ORDER XLVIII, RULE 9—*Review of Judgment—Second application for review—Practice*. *Semble*—that there is nothing in the Code of Civil Procedure which prevents a second application for review being made after a previous application for review has been made and rejected. *Gobind Ram Monadi v. Bhola Nath Bhatia*, I. L. R., 15 Calc., 432, referred to

Pallu v. Mathura Prasad 350

——— SCHEDULE II, CLAUSES 17 AND 20—*Award—Application to file an award on reference made out of court—Proceedings in court continued—Limitation—Act No IX of 1908 (Indian Limitation Act), sections 5 and 14, Article 1, article 178*. Pending proceedings for partition of mahal the parties concerned referred to arbitration out of Court the whole question of their title to the property in dispute, and the arbitrator delivered his award. The partition proceedings were nevertheless continued. More than six months after the date of the award, some of the parties filed an application in the Civil Court purporting to be under clause 17 of the second schedule to the Code of Civil Procedure, and subsequently an amended application under clause 20.

Held that the application was time-barred. Clause 17 of the second schedule to the Code of Civil Procedure was not by inapplicable, and neither section 5 nor section 14 of the Indian Limitation Act, 1908, could be applied in favour of the amended application under clause 20.

Ram Ugrah Pande v. Achraj Nath Pande 85

——— SCHEDULE II, PARAGRAPH 21; ORDER XLIII, RULE 1—*Arbitration—Application to file an award made out of court—Application granted ex parte—Refusal to set aside ex parte order—Appeal*. *Held* that an appeal will lie against an order rejecting an application to set aside an *ex parte* decree passed under paragraph 21 of the second schedule of the Civil Procedure Code, 1908

Nihal Singh v. Khushhal Singh 297

"COMMON GAMING HOUSE," *See* Act No. III of 1867, sections 1 and 3 47

COMPANY, *See* Act No. VI of 1882, sections 61, 126, 161 347

COMPLAINT, *See* Act No. XLV of 1860, section 498 276

Page.

COMPROMISE, *See* Act No. IV of 1882, section 6 167

——— *See* Act No. XVI of 1908, sections 17 and 49 .. 346

——— *See* Civil Procedure Code (1908), order XXIII, rule 3 .. 75

——— *See* Contribution 237

CONSTRUCTION OF DOCUMENT—*Deed of sale followed after an interval by an agreement for re-sale, the stated period—Mortgage by conditional sale—Right of redemption—Intention of parties as evidenced by language of deeds, conduct of parties and surrounding circumstances—Strong prima facie presumption against interest by Mohammedan—Registration Act* 1877 *of* 1908. The question in this appeal was whether a certain instrument in writing, a deed, dated the 26th of August, 1852, executed by the appellant's predecessors in title, purporting to sell a certain share in certain property, and an agreement, dated the 6th of September, 1852, executed by the predecessor in title of the respondents, conferred on the vendors a right to repurchase the property and on repayment of the original purchase money within nine or ten years, constituted, when taken together, a mortgage by way of conditional sale of the property or an absolute sale of it with an agreement for reconveyance. The deeds were separately attested, and were brought under registration. The vendors never availed themselves of the conditions of repurchase and the appellant sued in 1907 for redemption. The parties to the suit were Muhammadans

Their Lordships of the Judicial Committee were of opinion that the intention of the parties, which was the test in such a case, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances, and came to the conclusion that on this principle the decree of the High Court appealed from, that the transaction was an outright sale, and not a mortgage by conditional sale, should be affirmed.

Bhagwan Sahai v. *Bhagwan Din*, I. L. R., 12 All., 267; L. R., 17 I. A., 96, followed. *Debi Baksh Roy* v. *Ramjas*, I. L. R., 24 All., 149; L. R., 29 I. A., 55, distinguished. *Alderson* v. *White*, 2 De G. & J., 97, referred to

The provisions of a bond executed by the purchaser contemporaneously with the sale-deed recited the suggestion that any of the parties to the sale deed held any religious principles against the payment or receipt of interest on money lent, or that which was intended to be a sale a mortgage they would have adopted special methods of concealing or disguising the fact that interest for the loan was in fact to be given and received.

With reference to a remark of Lord Cranworth, L. C., in *Alderson* v. *White*, that "I think a court after the lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be," Their Lordships, commenting on the facts that the period of 10 years fixed in the present case for repurchase terminated in 1852; that the suit was instituted on the 5th of October, 1907, 44 years after the lapse of that period; that the judgment appealed from was delivered on the 11th of March, 1911; that the record was not received at the Privy Council office till the 25th of February, 1915, and the appeal was not down for hearing until June, 1916, said: "Enough on the part of the vendors to show that the instrument of conveyance is executable to any purpose, and every effort should be made to construe the said [illegible]

Jhanda Singh v. Wahid-ud-din 510

——— *Covenant or Indemnity—Land wrongly conveyed by reference to other land of the vendor—Land subsequently transferred—Registration No* XXXI *of* 1863, *section* 50. In 1854 one Altaf

Page.

Husnun sold certain land to the predecessor of the defendants and reserved some land for himself. The sale deed contained a covenant to the effect that the vendee would pay the Government revenue not only for the land purchased by him but also for the land reserved by the vender for himself. The vendor subsequently sold the reserved land to the plaintiff, who, when the representatives of the original vendee refused to pay the Government revenue, paid it himself and sued to recover from them the amount so paid which the plaintiff had to pay owing to the defendants' refusal to pay.

Held (1) that the agreement was void under Regulation XXXI of 1803, which was in force in 1854, and (2) that in any case the covenant was a personal one and the plaintiff had no right to sue in respect of its breach. *Sahib Ali* v. *Subhan Ali*, I. L. R. 21 All., 12, *Sri Thakurji Maharaj* v. *Lachmi Narain*, 11 A. L. J., 222, and *Ram Govind* v. *Sri Thakurji Maharaj*, 11 A. L. J., 231, referred to.

Ali Hussain v. Hukmi-ullah 230

CONSTRUCTION OF DOCUMENT. *See* Act No IX of 1877, section 74 .. 52

——————— *See* Act No I of 1873, section 94 .. 103

——————— *See* Mortgage 97

——————— *See* Will 214

CONTRACT. *See* Guardian and minor 436

CONTRIBUTION—*Compromise—Claim by party to a compromise alleging payment by himself of money for payment of which he and others were jointly liable—Joint tort-feasors.*] A Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised, and the compromise was made a decree of court. Amongst the conditions of the compromise was one to the effect that the brothers should pay back a certain sum of money belonging to their sister's estate which had been collected and misappropriated by them.

Held, on a suit by one of the brothers who alleged that he had paid the whole sum and asked for contribution, that the rule laid down in *Merryweather* v. *Moore*, 2 T. R., 160, that there was no right of contribution amongst joint tort-feasors did not apply to this case when the claim was based on the terms of a compromise, and *quære* whether the rule should be applied in India at all. *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, [1894] A. C., 318, referred to.

Nihal Singh v. The Collector of Bulandshahr .. 237

——————— *See* Mortgage 92

CONTRIBUTORY. *See* Act No. VI of 1882, sections 61, 125, 152 .. 547

COPY RIGHT—*Preparation by a member of the Board of Studies, Allahabad University, of a list of graduated selections from different authors for certain examinations—Publication by the Syndicate of a syllabus, containing, amongst other things, the selections already referred to—Publication of same in book form by a bookseller—Infringement of copyright.*] A, a member of the Board of Studies of the Allahabad University, prepared at the request of the convener a list of graduated selections from standard Persian authors for the use of candidates for certain examinations of the University. In preparing these lists he spent considerable labour, learning and skill. The Board of Studies, after due consideration, adopted, with slight modifications, the selections shewn in the list as the subject for these examinations in Persian and published the lists for the information of the public

Pages.

generally and of the candidates concerned specially. Subsequently to this *B*, a firm of publishers, compiled books from the original authors according to their lists. *Held* that *A* had no copyright in the lists as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities

Muhammad Abdul Jalil v. Ram Dayal 434

CO-SHARERS, *See* Pre-emption 260

COURT FEE, *See* Act No VII of 1870, section 7, clauses v and x .. 262

COURT OF WARDS, *See* Act No XVII of 1876, sections 173 and 174 .. 275

CRIMINAL PROCEDURE CODE, SECTIONS 4 AND 476—"*Complaint*"—*Statement made to magistrate in his executive capacity—Act No XLV of 1860 (Indian Penal Code), section 211.* *Held* that it was not competent to a Magistrate to treat as a complaint, and found thereon such procedure as would naturally follow on a complaint, including a prosecution under section 211 of the Indian Penal Code, a statement which was made to him executively and without any intention or desire that it should be taken as a complaint, but merely in reply to a question asked by the Magistrate.

Emperor v. Bhole Singh 32

——SECTIONS 4, 193, 283 (3), *See* Act No. XLV of 1860, section 476 276

——SECTION 107, *See* Security for keeping the peace 466

——SECTION 110—*Security to be of good behaviour—Appeal—Judgment.*] A court of appeal dismissing an appeal summarily is not bound to write a judgement, but an appeal from an order requiring a person to furnish security to be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged. And in such cases a District Magistrate should not dispose of an appeal otherwise than by judgement showing on the face of it that he has applied his mind to a consideration of the evidence on the record, and of the pleas raised by an appellant, both in the court below and in his memorandum of appeal.

Emperor v. Lal Behari 393

——SECTION 165—*Warrant for search of house—Resistance to police—Legality of warrant.*] In the course of an investigation into a dacoity which had occurred in the Agra district a circle inspector of the Mainpuri district sent a sub-inspector to the circle inspector concerned with a suggestion that the house in which one Nihal Singh lived, in the Mainpuri district, might be searched. The Agra circle inspector thereupon gave, as he said, written instructions to the sub-inspector who had been sent to him from Mainpuri to the effect that, "the house of Nihal Singh be searched in connection with the dacoity at Nagla Marh, that he might be arrested for the sake of identification, and that the houses of three persons should also be searched" who were suspected by the sub-inspector of receiving stolen property. Nihal Singh was not directly implicated by any one in the dacoity under investigation. When the police in pursuance of this order attempted to search the house where Nihal Singh was living, which belonged to Brikbhan Singh, his father-in-law, they were assaulted by Brikbhan Singh and his relations and friends and prevented from conducting the search or arresting Nihal Singh

Pages.

Held that the authority under which the police had attempted to make the search was invalid and the persons resisting them could not be convicted under section 332 of the Indian Penal Code, Whether or not these persons might have been found guilty under other sections of the Indian Penal Code, as e.g., sections 307, 336 or 143, was discussed but not decided on the evidence in the case

Emperor v. Bachhoban Singh 14

CRIMINAL PROCEDURE CODE, section 195 (1) (*c*)—*Sanction to prosecute—Officer alleged to have been committed to custody of a document produced in a Civil Court by a party, but before the person producing it had ceased to be a party to the suit*.—The words used in section 195 (1) (*c*) "which such document has been committed by a party to any proceeding in any such Court" refer not to the date of the commission of the alleged offence, but to the date on which the cognizance of the Criminal Court is invoked.

Hence where such a document has been produced or given in evidence in a Court, the mere fact that such Court or some other Court to which that Court is subordinate, has no necessary interest a party to the proceedings in which the document was produced or given in evidence, or has ceased, notwithstanding that the offence alleged was committed before the document came into court, at a time when the person complained against was not a party to any proceeding in court.

Gudhari Mookerji v. *King-Emperor*, 12 C. W. N., 822, *Kunc-Emperor* v. *Raja Mustafa Ali Khan*, 8 Oudh Cases, 3-5, and *Emperor* v. *Lala Pearey*, L. R. 38 All., 564, referred to. *Nur Mohammad Canison* v. *Kashinath Mandelyar*, 4 Bom. L. R., 968, not followed.

Emperor v. Bhawani Das 169

——— SECTIONS 233 (2) and 235—*Act No. XLV of 1860 (Indian Penal Code), sections 409 and 477 A—Misconduct of charges—Criminal breach of trust and falsification of accounts—Triability*.—An accused person was charged with and tried at the same trial for offences under section 409 and section 477 A of the Indian Penal Code;

In respect of the former offence he was charged with criminal breach of trust respecting a lump sum of money composed of numerous items. In respect of the latter offence he was charged with suppressing a large number of documents, showing the transfer to them of sums of money by the persons liable to pay the same, and with putting false numbers on three of such documents. These documents (called *counterfoils*) existed as well to other sums of money as to the sums which the accused was alleged to have embezzled.

Held, that the principle of section 233 (2) of the Code of Criminal Procedure could not apply to section 477 A of the Indian Penal Code, and that the framing of the charge against the accused in the manner described was an illegality which vitiated the trial.

Emperor v. Kalka Prasad 42

——— SECTIONS 235 AND 239, *See* Jurisdiction of cases 457

——— SECTIONS 239—*Trial for a series of acts connected together forming the same transaction—Joint trial—Theft and receiving stolen property*.—*Held* that, on the whole case of evidence clearly disassociating the act of receiving the stolen property from the theft thereof, the theft and the receipt of the stolen property may be considered as parts of the same transaction. It would not, therefore, be illegal to try the thief and the receiver jointly. *Emperor* v. *Bulchand Tarachand*, 6 Bom. L. R., 917, followed.

Emperor v. Shiam 311

Page.

CRIMINAL PROCEDURE CODE, section 3.0 —*Summary of judgment—Power of High Court to revise the said order on the petition side—Rules of Court, chapter VII, rule 8—Finality of order. Held*, that the High Court has no power to review an order dismissing an application to revive a criminal case on the petition side. *In the matter of the petition of E. W. Gibson*, I. L. R., 24 Calc. 422, and *Queen-Empress v. Durga Charan*, I. L. R., 7 All., 372, followed.

But so long as an order is not settled as required by the chapter VII, rule 8, of the Rules of Court it is not final, and is open to the Judge who passed it to revise it. *Queen-Empress v. Fakir Chand*, I. L. R., 21 All., 177, and *Emperor v. Bhika*, I. L. R., 27 All., 92, followed.

Emperor *v.* Govind Sahai 134

——————————sections 195 and 417—*Order of several accused by the same Court to be tried separately have proceeded, other is to witness against—Appeal. Held*, that the right of appeal exercisable by a person who has not withdrawn such a interested cannot with it a right of appeal like by any other person convicted at the same trial, even though that particular person may have received a sentence which, if it stood alone, would not have been appealable.

Emperor *v.* Lal Singh 399

——————————section 476—*Institution for perjury—Court bound to set out statements of perjury alleged—Civil Procedure Code*, 1908, section 195—*Revision—Irregularity. Held*, that where a civil Court intends to act under section 476 directing that a person should be prosecuted for perjury such Court is bound to set forth in its order the statements or statements of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of section 115 of the Code of Civil Procedure.

Emperor *v.* Kashi Shukul 606

——————————section 562—*Summary trial against an accused person who is not present—Conviction not justified in the case where accused cannot, after arrest, be found, and the prosecution*: to show that he had failed to appear in accordance with the Code of Criminal Procedure cannot be held against the person accused whom it was taken, unless it could be shown that he knew the charge was described or that provided the satisfaction of the Court that the issue of a bail warrant and that of arrest was no longer prospect of attaining him.

Emperor *v.* Ruston 87

CROSS DECREES, *See* Civil Procedure Code, 1908, *sections* XX., rule 18.. 602

CUSTOM, *See* Pre-emption 27

DECREE *ex parte*, *See* Guardian *ad litem* 314

——————for less than the amount claimed, *See* Civil Procedure Code (1908), order XXXIII, rules 10 and 11 403

——————*for possession—Decree-holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger—Res judicata.* The doctrine of merger does not apply to a decree for possession. If a party obtains a decree for a share or for damages for cost, the original cause of action merges in the decree, but a decree for ejectment differs very much from other decrees.

Plaintiff obtained a decree for possession of certain immovable property which she did not put into execution for over three years,

Page

but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession.

Held, that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession.

Quære whether a suit is maintainable upon a decree when the execution of it has become time-barred.

Dhauraj Singh *v.* Lakhmi Kunwar 209

DECREE passed against company prior to liquidation, *See* Act No. VII of 1913, section 207 427

DISQUALIFIED PROPRIETOR, *See* Act No. XVIII of 1876, sections 178 and 174 371

DISTRESS, *See* Act (Local) No. II of 1901, section 124 40

DOCUMENT attested by one witness only. *See* Act No. IV of 1882, section 59 403

DOCUMENTS, incomplete, bearing forged signature of executant, *See* Act No. XLV of 1860, sections 30 and 477 430

DOWER. *See* Muhammadan law 581

DUTIES OF AN ARBITRATOR, *See* Civil Procedure Code (1908), section 104(*f*) 389

EQUITY OF REDEMPTION, *See* Mortgage 411

ESTATE, absolute or limited, *See* Hindu law 440

ESTOPPEL, *See* Act No. I of 1879, section 116 226

EVIDENCE—*Secondary evidence—Certified copy of petition of compromise made in 1857—Loss of proceedings destroyed in the Mutiny—Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Board Regulation X of 1829—Objection that certified copy is insufficiently stamped—Petition treated as document creating mortgage.*] In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857, the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on the 1st of April, 1857. The record of the proceedings was admittedly destroyed in the Mutiny of that year. The document, which was admitted in evidence by the Subordinate Judge, recited the terms on which the dispute was settled, amongst them being the agreement relating to the mortgage, and an endorsement on it, after reciting that "the pleaders for the parties filed the compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein" ordered that "the compromise be placed on the record, and the case be put up to-morrow (for final disposal)." Then followed the date and the signature of the Zilla Judge in English. The certified copy was, on the 26th of April, 1897, issued to the pleader acting for the predecessors of the plaintiffs. It bore a stamp of one rupee. The defence was that the contract was not enforceable as the document was not properly stamped. The Subordinate Judge overruled the objection and decreed the suit. The District Judge held that the copy was required by article 3 of Regulation X of 1829, to bear a stamp of the same value as the original compromise, that the original bore a stamp of one rupee only, but required a stamp of ten rupees, and as it was insufficiently stamped the copy was not admissible in evidence. He reversed the decision of the first court and dismissed the suit. The High Court on appeal restored the decision of the Subordinate Judge.

Page.

Held by the Judicial Committee (affirming that decision) that the mortgage was made validly and was valid according to the law then in force, and it was notified to the court as part of the settlement. The present suit was not based on any agreement contained in the petition, but on a contract made outside and recited in it to enable the court to make a decree in accordance with the settlement. If the Judge did so, the defendants' objection fell to the ground, and, whether he did or not, the suit based on the agreement made independently of and before the petition was filed in Court was clearly maintainable.

If, however, the petition was treated as the document creating the mortgage it might rightly be presumed that the others before whom it was presented satisfied themselves that it was properly stamped. No inference could be drawn from the fact that the copy bore a one rupee stamp, for that is the proper stamp for issuing a copy of the proceeding in the Zilla Court, and as a copy of the petition and the order thereon it bore the proper court fee stamp of one rupee. The District Judge fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

Ahmad Raza v. Abdul Hussain 494

EVIDENCE, *See* Act No I of 1872, section 94 103

——*See* Act No. X of 1875, sections 5, 6 and 13 47

——*See* Criminal Procedure Code, section 512 75

——*See* Security for keeping the peace 498

——Additional——, *See* Civil Procedure Code (1908), order XLI, rule 27 191

——Endorsement of documents admitted as——, *See* Muhammadan law 627

EXECUTION OF DECREE—*Sale of zamindari rights—Whether buildings pass with the zamindari or not.*] The doctrine that the sale by auction of a zamindari does include also buildings situated within the zamindari, is only applicable in the absence of evidence indicating an intention to exclude such buildings from the sale. *Abu Hasan v. Ramzan Ali*, I. L. R., 4 All., 98, distinguished.

Sukhawat Ali Shah v. Muhammad Abdul Karim Khan .. 60

——*See* Act No VII of 1887, section 25 .. 690

——*See* Act No IX of 1909, schedule I, articles 165 and 182 339

——*See* Civil Procedure Code (1908), section 144 .. 540

——*See* Civil Procedure Code (1908), section 145, order XXXIV, rule 14 617

——*See* Civil Procedure Code (1908), order XXI, rule 2 304

——*See* Civil Procedure Code (1908), order XXI, rule 16 289

——*See* Civil Procedure Code (1908), order XXI, rule 63 72

——*See* Civil Procedure Code (1908), order XXI, rule 66 431

EX PARTE DECREE, *See* Act No IX of 1887, section 17 425

FAMILY SETTLEMENT—*Claim to property to which the claimant must have known he had no title—Relinquishment to avoid litigation—Such relinquishment not binding on reversioners.*] One D R upon

Page

the death of his wife, had given to certain property which had been the property of the wife's father and had been given to the wife by her mother. The mother and the surviving sister of the wife, in order to avoid litigation, relinquished a substantial portion of the property to B. R

Held, that but for the covenants entitled to succeed to the property upon the death of the survivor of the two ladies, that the relinquishment in so far them could not properly be called a family settlement and was not valid against the reversioners who were minors at the time when the so-called family settlement was made. *Bibee Lal* v. *Dand Hasoon*, I L. R., 25 All., 243, and *Hanm Bibi* v. *Sohan Bibi*, 16 C. W. N., 929, referred to.

Hidayat Rasul v. Dhanpat Rai 339

FAMILY SETTLEMENT, *See* Act No XVI of 1908, section 17 and 40 .. 306

FINDING OF FACT, *See* Second Appeal 122

FORGERY, *See* Act No XLV of 1860, sections 30 and 467 100

FRAUD, *See* Suit to set aside a decree 7

—— .. .. .. to obtain of guardian. *See* Minor 432

GIFT, *See* Act No. IV of 1882, sections 123 and 129 278

—— *See* Muhammadan Law 937

GUARDIAN, *See* Minor 454

GUARDIAN AD LITEM—*Joint Hindu family—Suit on mortgage against father and sons—Irregular appointment of father as guardian of minor sons—Ex parte decree—Suit by sons to recover their shares.*] In a suit for sale on a mortgage executed by the father of a joint family governed by the Mitakshara law plaintiffs impleaded as defendants the father and his minor sons, two of whom were minors. The plaintiffs named the father as guardian of the minors, but no steps were taken, as required by the old Code of the High Court, to ascertain whether the father was willing to act as guardian. The father did not appear, and an *ex parte* decree was passed, in execution whereof the family property was sold. Subsequently, on obtaining majority, the minor sons brought a suit for possession of their shares, alleging that the original decree was an improper one which they were not bound to discharge, and that they had not been legally represented in the previous suit

The court of first instance having dismissed the suit without going into the merits, the lower appellate court made an order of remand.

Held that there had been a serious irregularity, if nothing worse, in the appointment of the father as guardian *ad litem*, and as it was impossible to tell, without knowing to what extent the plaintiffs were in a position to establish their case regarding the immorality of the debt, how far the appointment of their father as guardian had prejudiced them, the order of remand was right.

Bajpath Rai v. Dharam Das Tewari 54

GUARDIAN AND MINOR—*Contract—Specific performance—Specific performance of a contract not favourable to minor, refused.* The District Judge, sanctioned the sale by the certificated guardian of a minor of a house belonging to the minor for a price of Rs 1,800. There arose, however, some dispute about the drafting of the deed of sale and the purchase was not carried through. Meanwhile offers came were made for the property, and ultimately the District Judge directed that the house should be sold to one Abdullah for Rs. 2,000.

Page.

Held, on suit brought by the person in whose favour the sale had originally been sanctioned, that the court was in the circumstances justified in refusing to grant a decree for specific performance. *Ohhatar Mal v. Jogat Nath Poonal*, I. L. R., 29 All., 213, referred to.

Imdad *v.* Muhammad K. Ho 493

GUARDIAN AND MINOR. *See* Mortgage 92

HIGH COURT. Powers of revision of ——, *See* Criminal Procedure Code, section 250 124

HINDU LAW—*Daughter's estate—Suit by unmarried daughter for possession of her father's property—Death of plaintiff—Right of married daughters to continue the litigation.*] A deceased Hindu died leaving him surviving a widow and four daughters, three married and one unmarried. After the death of her mother, the unmarried daughter sued to recover possession of her father's estate, naming her three married sisters as *pro forma* defendants. The plaintiff, however, died during the pendency of the suit. The three married daughters were then on their application transferred from the array of defendants to that of plaintiffs. Nevertheless the suit was dismissed upon the ground that it had abated by reason of the death of the original plaintiff.

Held, that the suit should not have been dismissed. The principal plaintiff represented the estate, and her sisters were entitled to continue the litigation which she had commenced. *Mahadeo Singh v. Sheo Karan Singh*, I. L. R., 30 All., 403, and *Baldeo Narayan Pillai v. Subbammal*, I. L. R., 30 Mad., 484, referred to. *Balak Ram v. Durga*, I. L. R., 30 All., 40, not followed.

Jaddubansi Kunwar *v.* Mahpal Singh 211

——— *Hindu widow—Effect of compromise entered into by a Hindu widow with a limited estate—Rights of reversioners.*] A Hindu widow in possession as such of her husband's estate brought a suit for possession of two shops on the allegation that they formed part of her husband's estate. The suit was compromised, the effect of which was that the widow recognized the defendant's equitable proprietary title, on the other hand, had to pay her a certain sum of money. To raise this money the mortgage of the two shops. The mortgagee brought a suit for sale and the shops were purchased by one H. At the auction sale after the death of the widow the reversioners of her deceased husband brought a suit to recover possession of the aforesaid shops.

Held, that a compromise entered into by a Hindu widow, with a limited estate, resulting in the alienation of property forming part of her husband's estate, cannot bind the reversioners, unless it is shown that it was for such purposes as would justify a sale by a Hindu widow. *Imrit Konwar v. Bhoop Narain Singh*, 9 C. L. R., 76; *Musammat Raj Kunwar alias Sheo Murat Kuer v. Musammat Bakeshi Kunwar*, 8 B. L. R., 350, *Kalpakshma Dadee v. Kalpayana Dadee*, I. L. R., 38 Calc., 639, *Kunwar Lal v. Golabi Krishna Narain*, I. L. R., 33 All., 356, *Mahadeo v. Baldeo*, I. L. R., 30 All., 40, *To and Bahari Lal v. Daud Hussain*, I. L. R., 35 All., 340, referred to.

Kanhaiya Lal *v.* Kishori Lal 979

——— *Joint Hindu family—Succession—Presumption—Estate once in the possession of a family not subdivided—Gift of property to one member of the same family—Construction of grant.*] The question whether a certain estate is impartible or not is one of fact in each case.

Page.

Where an impartible estate is lost to a certain family and on the representation of a member of that family the Government puts him into possession making a grant in his favour without any special terms or condition in the grant, the property so restored would be joint family property in the hands of the member of the family to whom the grant is made.

When the Government makes a grant of an estate it can determine the nature of the grant, but in the absence of specific terms in the grant the surrounding circumstances must not be ignored.

The normal constitution of Hindu family is union. And it is the very essence of an impartible estate that there is no legal right to insist on partition. The estate is enjoyed by the whole family through the eldest of the gadis.

Held, that, when an impartible estate passes by survivorship from one line of descent to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line.

Held, further, that if the descendants of a junior member of an impartible estate partition the property given to their ancestor (or maintenance), it is not conclusive on the point as to whether the estate has ceased to be joint, for the purpose of finding out a successor to the *gadi*. *Kachi Viswa Ranyappa Kalakka Thola Udayar* v. *Kachi Kottyana Ranyappa Kalakka Thola Udayar*, I. L. R., 28 Mad., 503, *Kalavai Kolohar* v. *The Raja of Shivagunga*, 9 Moo. I. A., 543, *Durga Persad Singh* v. *Durga Koowar*, I. L. R., 4 Calc., 199, *Sirce Rajah Yanumula Venkayamah* v. *Sirce Rajah Yanumula Boochia Venkondora*, 13 Moo. I. A., 333, *Sarlej Kuari* v. *Deoraj Kuari*, I. L. R., 10 All., 272, *Tara Kumari* v. *Chaturbhuj Narayan Singh*, I. L. R., 42 Calc., 1173, *Bachoo Harkisondas* v. *Mankorebai*, I. L. R., 20 Bom., 51, *Raja Ray Singh* v. *Rani Bai-ni*, I. L. R., 7 All., 1, and *Nagappa Achammagya* v. *Venkatachalapati Nayanivaru*, I. L. R., 4 Mad., 250, referred to. *Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramakshadra Razu*, I. L. R., 14 Mad., 247, *Venkatarayudu* v. *Venkataramayya*, I. L. R., 16 Mad., 384, *Varkata Narasimha Appa Rao* v. *Parthasarthy Appa Rao*, L. R., 41 I. A., 51, and *Brij Indar Bahadur Singh* v. *Rajeo Jonkee Koer*, L. R., 5 I. A., 1, distinguished.

Baijnath Prasad Singh *v.* Tej Bali Singh .. 590

HINDU LAW—*Joint family property—Sale by father during minority of son—Suit by son for cancellation of sale—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article* 126.) A Hindu who at the time had a minor son sold certain joint property in 1887. The sale was pre-empted and part of the property was subsequently transferred by one of the pre-emptors. The vendor's son attained majority in 1895. More than three years after 1895 three sons were born to him and in 1903 the father and the sons sued for cancellation of the sale-deed of 1887.

Held, that the suit was barred by limitation, inasmuch as the title of the son of the original vendor became barred in 1898. The property ceased to be joint family property and the subsequently born grandsons were not in a position to dispute the sale.

Lachmi Narain *v.* Kishore Chand .. 126

———*Marriage—Marriage of Hindu girl contracted by maternal uncle in the presence of paternal relatives—Injunction obtained by disgruntled paternal relatives to stay the marriage without reasonable and probable cause—Maintainability of suit for damages.*] According to Hindu Law so long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage; but in cases where the paternal relatives refuse

Page

to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract a marriage on behalf of the girl.

A Hindu girl who was living with her paternal aunt and paternal uncle was made over to her maternal uncle as the result of an agreement come to between the parties. Subsequently the paternal aunt applied to be appointed guardian of the person of the minor, which application was dismissed. After this the maternal uncle of the girl arranged for the marriage of the girl with a certain person. The paternal aunt then obtained a temporary injunction and got the wedding put off. The marriage, however, was accomplished with the person selected by the maternal uncle. The maternal uncle brought a suit to recover damages for the loss caused to him by the wrongful issue of the injunction and the postponement of the wedding. *Held*, that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, and a suit for damages lay. *Kasturi* v. *Chunnu Lal*, I. L. R., 20 All., 265, referred to.

Kasturi v. Ranta Lal 559

HINDU LAW—*Mitakshara—Partition—Share of step-mother*.] Under the Mitakshara law a step-mother is entitled, upon partition of the joint family property, to a share equal to that of a son. *Hemangini Dassi* v. *Kedarnath Kundu Chowdhry*, I.L.R., 16 Calc., 758, distinguished. *Mathura Pursad* v. *Dasha*, Weekly Notes, 1890, p. 124, followed.

Hur Narain v. Bishambhar Nath 87

——*Mitakshara—Succession—Bandhu—Mother's brother's son preferred to mother's sister's son*.] According to Hindu law of the Mitakshara school, the mother's brother's son takes precedence as an heir over the mother's sister's son. *Appasami Vathiyar* v. *Bagubai Madaliyar*, I.L.R., 33 Mad., 420, dissented from. *Buddha Singh* v. *Lalta Singh*, I.L.R., 37 All., 651, referred to.

Ram Charan Lal v. Rahmi Bibiah 410

——*Succession—Lunacy—Effect upon the devolution of immovable property of lunatic's next heir—Right to succeed not barred from daughters of lunatic—Limitation—Act No. IX of 1871 (Indian Limitation Act), schedule I, article* 141.] A person is disqualified under the Hindu law from succeeding to property if by reason of lunacy when the succession opens, whether he is incapable to exercise it or not. *Deo Kishen* v. *Badri Prasad*, I.L.R., 5 All., 209, and *Tribeni Sahai* v. *Muhammad Umar*, I.L.R., 29 All., 247, referred to. The daughter, therefore, of such person would derive no legal title through her father.

The legitimate wife of a Jat in Hindu took possession during his lifetime of certain immovable property which had belonged to his father and subsequently transferred part of it to her daughters and to the husband of one of them. She retained a portion herself, which after her death came into the possession of one of the daughters. *Held*, that a suit to recover the property of which possession had been so obtained and held was governed by article 141 of the first schedule to the Indian Limitation Act, 1877. *Peggo* v. *Ram Baran Singh*, I.L.R., 29 All., 35, distinguished.

Ram Singh v. Mussammat Bhan 117

——*Will—Construction of will—Will of Hindu widow in possession of her husband's estate—Bequest of whole estate to one person on conditions—Condition containing exception in consequence of entire estate—Bequest of portion of estate to different legatee—Uncer*

Page

in possession—Maintenance—Absolute or limited estate.] A Hindu widow in possession of her husband's estate disposed of it by will as follows:—"Under the will of my husband I am the sole owner in possession of the entire estate . . . and possess all the proprietary powers . . . I bequeath the entire estate of my husband to Fatch Chand, . . . subject to the following conditions . . . (1) So long as I live I shall continue to be the owner in possession of the entire estate . . . and possess all the powers and such as making sales, mortgages, gift, etc. (2) After my death the said person (the legatee) shall become owner in possession of the entire estate of my husband, and he, too, shall possess all the powers of . . . Ibenition like myself. (4) I have bequeathed mauza Khudda with all the property to Mussammat Gomi . . . after my death also shall be the owner in possession of the entire property in mauza Khudda aforesaid."

Held (affirming the decision of the High Court that on the construction of the will the words "owner in possession" (*Malkeyat*) in clause 4, contrasted on Mussammat Gomi as "entire estate" and that completeness of the ownership and possession was not affected by any other expression in the will". *Sarupmoni v. Bidhi Nath Ojha*, 2 L.R., 30 All., 8; I.R., 35 I. A., 27.

Taking all the clauses of the will together there was no repugnancy in such a construction, for, though the entire estate was conveyed in the first place to Fatch Chand, it was subject to conditions, one of which (clause 4) bequeathed mauza Khudda as an exception to the conveyance of the entire estate

Fatch Chand *v.* Rup Chand 446

HINDU WIDOW, *See* Hindu law 479

IMPARTIBLE ESTATE. *See* Hindu law 580

INJUNCTION, *See* Hindu law 520

INSOLVENCY, *See* Act No. III of 1907, section 37 57

INTENTION, *See* Act No XLV of 1860, section 456 517

INTEREST, *See* Mohammedan law 531

JOINDER OF CASES—*Offences of the same kind committed in respect of different persons—Legality of joint trial—Criminal Procedure Code, sections 234 and 239—Practice.*] The words "offences of the same kind" used in section 234 of the Code of Criminal Procedure, and as defined by subsection (2) of the said section, do not imply that the offences should necessarily have been committed against the same person. Where therefore there were six persons accused of having been jointly concerned in carrying on a systematic swindle and three joint charges were framed against all the accused, *held* there was nothing illegal in the procedure. *Subedar Ahir v. Emperor*, I.L.R., 44 Calc., 13, followed. *Emperor v. Bhiwa*, I.L.R., 4 All., 147, dissented from.

Emperor *v.* Bachan Pande 457

JOINT HINDU FAMILY, *See* Guardian *ad litem* 316

——————*See* Hindu law 126

—— —— —— Holding owned by——*See* Act (Local) No. II of 1902, section 22 325

JOINT TORT-FEASORS, *See* Contribution 227

JOINT TRIAL, *See* Criminal Procedure Code, section 239 .. 311

——————*See* Joinder of cases 457

JUDGEMENT, *See* Criminal Procedure Code, section 110 393

	Page
JURISDICTION, *See* Act No. VII of 1913, section 207	407
—— (Civil and Revenue Courts) *See* Act (Local) No. II of 1901, sections 38 and 177 (6)	455
—— *See* Act (Local) No II of 1901, section 164	322
—— *See* Act (Local) No III of 1901, section 233, clause (h)	343
KIDNAPPING, *See* Act No. XLV of 1860, sections 361, 366, 109	664
KAMBARDAR, Suit against—for profits, *See* Act (Local) No. II of 1901, section 164	322
LANDLORD AND TENANT, *See* Act No I of 1879, section 13	220
LEASE, *See* Act No IV of 1882, sections 105 and 107	278
LEGAL PRACTITIONER, *See* Act No. XVIII of 1879, section 11	232
LEGITIMACY, *See* Muhammadan Law	727
LETTERS OF ADMINISTRATION, *See* Act No VII of 1889, section 4 ..	474
LIABILITY of contributory for calls, *See* Act No VI of 1882, sections 61, 123, 124	247
LICENCE, *See* Act No IV of 1882, sections 105 and 107	278
LIMITATION, *See* Act No VII of 1887, section 25	620
—— *See* Act No IX of 1908 (Indian Limitation Act), section 12, schedule I, article 179	82
—— *See* Act No. IX of 1908, schedule I article 62	676
—— *See* Act No IX of 1908, schedule I, articles 134 and 144	198
—— *See* Act No IX of 1908, schedule I, articles 165 and 144	320
—— *See* Civil Procedure Code (1908), order XXI, rule 2	294
—— *See* Civil Procedure Code (1908), order XXXIV, rule 5	91
—— *See* Civil Procedure Code (1908), schedule II, clauses 17 and 20	95
—— *See* Hindu law	127
—— *See* Hindu law	126
—— *See* Mortgage	97
—— *See* Mortgage	340
LUNACY, *See* Hindu law	127
LURKING HOUSE TRESPASS, *See* Act No XLV of 1860, section 456	517
MAQBUZA, use of the term. *See* Pre-emption	264
MALIK-O-QABIZ, *See* Hindu law	340
MARRIAGE, *See* Hindu law	126
MERGER, *See* Decree for possession	569
MESNE PROFITS, *See* Civil Procedure Code (1877), section 583 ..	103
MINOR—*Guardian—Suit to enforce a decree against a minor—Minor properly represented in such suit—Fraud or collusion of guardian.*] A decree obtained against an infant properly made a party and properly represented in the case cannot be set aside by means of a separate suit except upon proof of fraud or collusion on the part of the guardian,	
Bom Prasad v. Lekh Ram	452
—— *Purchase of immovable property by minor—Suit by purchaser for possession of property purchased—Act No IV of 1882 (Transfer of Property Act), sections 54 and 55.*] A minor is capable of purchasing immovable property, and where such a purchase has been completed by execution and registration of a sale-deed, he can	

Page.

sue to recover possession of the property purchased upon tender of the balance of the purchase money. Such a suit is not a suit for specific performance of a contract and no question of mutuality arises. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*, I. L. R., 89 Calc., 132, and *Mohori Bibee* v. *Dharmodas Ghose*, I.L.R., 30 Calc., 539, distinguished. *Shib Lal* v. *Bhagwan Das*, I.L.R., 11 All., 241, *Baijnath Singh* v. *Fatta*, I.L.R., 30 All., 165, *Velayutha Chetty* v. *Gnanasekarana Naicker*, I.L.R., 33 Mad., 214, *Vijai Ram* v. *Ganga Sharan*, I.L.R., 28 All., 657, *Mantu Khanum* v. *Madan Gopal*, I.L.R., 28 All., 69, *Bahadoor* v. *Bafayet Hosain*, 13 Indian Cases, 451, *Raghunath Bakhsh* v. *Sayi Sheikh Mahomed*, 18 Oudh Cases, 115, and *Mussoo Kooer* v. *Perumal Reddy*, 24 M. L. J., 393, referred to. *Nirakoti Nagamma Chetty* v. *Lagadapu Chetty*, I.L.R., 33 Mad., 312, dissented from.

Nemai Das v. Manmohini Dasi 354

MINOR, *See* Act No. IV of 1882, sections 5, 6, 7 and 157 62

MISJOINDER OF CHARGES, *See* Criminal Procedure Code, sections 229 (2) and 239 43

MITAKSHARA, *See* Hindu law 69, 416

MONEY left with purchaser for payment to mortgagee, *See* Mortgage .. 209

MORTGAGE—*Construction of document—Anomalous mortgage—Suit for foreclosure—Limitation—Act No IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 135—*Regulation No. XVII of* 1806.] A mortgage was made on the 25th of February, 1856, for a period of six years. It was provided that, if after six years anything remained due to the mortgagees, they might forthwith enter into possession of the mortgaged property and realise the principal and interest. It was further provided that the property would not be transferred so long as any principal or interest remained due, and that if it was transferred, or if the money due to the mortgagee was not paid, the mortgagee, without waiting for the expiry of the six years, might bring a suit for recovery of the principal and interest, and might also get possession "by completion of sale." Nothing at all was paid by the mortgagor in the way of either principal or interest and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1806 were not taken by the mortgagee. In the year 1910, the representatives of the mortgagee instituted a suit for foreclosure.

Held, on a construction of the mortgage bond in suit, that the cause of action accrued in 1867, and the suit was barred by limitation.

Kishen Mohan Roy v. Ganga Baha Debi, I. L. R., 33 Calc., 923, distinguished. *Srinath Das* v. *Khetter Mohun Singh*, I. L. R., 16 Calc., 893, followed. *Sugan Chander Singh* v. *Bolidei*, 10 A. L. J., 522, and *Ram Dayar Rai* v. *Bhirgu Rai*, 10 A. L. J., 538, referred to.

Bans Gopal v. Shib Ram Singh 97

——*Contribution—Payment by co-mortgagor—Guardian and Minor—Power of de facto guardian to mortgage minor's property—Mahommedan law.*] *Held* that where a joint mortgagor seeks contribution upon the ground that he has paid the whole mortgage debt and thus relieved the property of his co-mortgagor from a burden, it is not necessary for him to plead that he did so under compulsion.

Held also, that the *de facto* guardian of a minor Mahommedan is competent, in case of necessity and for the benefit of the minor, to make a valid mortgage of the minor's property.

Abd Ali v. Imam Ali 92

Page

MORTGAGE—*Mortgagee in possession—Equity of redemption—Adverse possession while period of redemption in existence—Trust to redeem by a person whose name is recorded in revenue papers—Held* that a person could not acquire a title, by adverse possession, to land which was the subject of a usufructuary mortgage, and therefore in the possession of the mortgagee, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the mortgaged property. *Lala Kanhia Lal v. Mohammad Mumtaz Beg*, 6 C. W. N., 601, not followed. *Ganga Sahai v. Sita Ram*, I Agra, 295, distinguished.

Kunwar Sen v. Parbati Lal 411

———*Redemption—Burden of proof—One mortgagor redeems the entire mortgage—Acknowledgement—Dakhilnama—Act No. IX of 1908 (Indian Limitation Act), section 19, schedule I, article* 148.] In a suit by the representatives of some of the co-mortgagors for the redemption of their shares in certain property against the representatives of co-mortgagors, who had redeemed the mortgage the plaintiffs alleged that the mortgage had been made by one Sukhjit in favour of one Muhammad Hasan in the year 1912 Sambat. The plaintiffs also relied on certain acknowledgements made by the defendant's predecessor in title. One of these was a dakhilnama executed by Ram Lal in 1870 which contained a description of the property and was signed by Ram Lal. The defendant contended that there was no mortgage; that he was absolute owner; that the acknowledgements had not been proved, and that the suit was time-barred. It was held by the lower appellate court that the date of the mortgage had not been proved, but the acknowledgements were in respect of some mortgage and that the plaintiffs were entitled to redeem.

Held, that the rule of limitation governing a suit of this kind was that laid down in *Ashfaq Ahmed v. Wasir Ali*, I.L. R., 31 All., 478, viz. that article 148 of schedule I to the Limitation Act applied, that is, the limitation extended for a period of 60 years from the date of execution of the mortgage or from the date when the mortgage money became due, and the burden was upon the plaintiffs of proving the mortgage that they had set up, and that it was for them to prove that the acknowledgements relied upon by them as contained in the *dakhilnama* had been made at a date within the period of limitation.

Held further, that the acknowledgement contained in the *dakhilnama* amounted to nothing more than a description of the property purchased and was not an acknowledgement of liability within the meaning of section 19 of the Limitation Act. *Dharma Vishal v. Govind Sadashiv*, I. L. R., 8 Bom., 99, referred to.

Khub Ram v. Tuk Ram 643

———*Sale of mortgaged property—Purchase money "left with the purchaser for payment to the mortgagee"—Nature of the transaction—Held* [ ] Where a mortgagor sells the mortgaged property and, as is commonly expressed, leaves part of the price with the purchaser for payment to the mortgagee, the transaction is merely one of sale subject to the mortgage. No trust is created for the purchaser for payment of the portion of the price "left with him" to the mortgagee.

Jumna Das v. Ram Autar Pande 900

———*Subrogation—Partial discharge of prior encumbrance—Purchaser of equity of redemption, entitled to stand in the shoes of prior encumbrancer to the extent that the encumbrance has been discharged*.] A purchaser of the equity of redemption is entitled to stand in the

Page.

shoes of a prior incumbrancer, where the purchaser has, with the consent of that incumbrancer, partially discharged the liability.

Gurdeo Singh v. Chandrikah Singh, I. L. R., 3 Calc., 198, dissented from. *Chotoomul v. Alloo*, 1 Ch. D., 353, followed. *Baroness Wenlock v. The River Dee Company*, I. R., 19 Q. B. D., 155, referred to.

Udit Narain Misir v. Achhan Lal 509

MORTGAGE—*Suit for redemption—Tender of mortgage money a condition precedent to the institution of a suit for redemption.*] A usufructuary mortgage of agricultural land provided that the right to redeem should be exercised only in the month of *Jeth* of any year.

Held, that before the mortgagor could sue for redemption it was unnecessary for him to prove that he had tendered to the mortgagee the mortgage-debt or such amount as he considered due on the mortgage in the month of *Jeth* of some year after the mortgage money had become payable. *Bansi v. Gridhari Lal*, Weekly Notes, 1894, p. 143, followed.

Muhammad Ali v. Baldeo Pande 148

See Act No. I of 1872, section 91 203

See Act No. IV of 1882, section 60 441

———*See* Civil Procedure Code (1908), order XXXIV, rules 4 and 5 308

See Pre-emption 361, 510

——by conditional sale, *See* Construction of document .. 370

——Decree absolute for sale on ——*See* Civil Procedure Code (1908), order XXXIV, rule 5 21

——executed by Collector, *See* Act (Local) No. II of 1903, section 57 351

——Redemption of ——*See* Act No. IX of 1908, schedule I, articles 134 and 144 148

MORTGAGEE in possession, *See* Mortgage 441

MUHAMMADAN LAW—*Dower—Interest on unpaid dower—Claim for, by widow allowed to take possession of her husband's estate to satisfy her dower-debt—Liability of widow in possession to account for profits of estate—Exception by Muhammadan law of equitable principles in such a case.*] Where a Muhammadan widow was allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income of it, and there was no agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower

Held, that, on equitable considerations she was entitled to some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal rights to exact payment of her dower on the death of her husband; and such compensation for forbearance to enforce a money payment was best calculated on the basis of an equitable rate of interest. This appeared to be consistent with Muhammadan law (see the chapter on "The Duties (*Adab*) of the Kazi" in the principal works on that law), which clearly showed that the rules of equity and equitable considerations commonly recognised in the courts of Chancery in England are not foreign to the Muslim system, but are in fact often referred to and invoked in the adjudication of cases.

The decision in *Wuzeerun Fatima Begam v. Mooramutoollah Khanum*, 9 W. R., 318, that it would be inequitable to make the widow account for the profits, except on the terms of allowing her reasonable interest on the dower-debt, was approved

Page.

In suits brought by the other heirs against the widow for the taking of accounts, for a decree to the plaintiffs of their respective shares in case the dower-debt was shown to have been discharged, and for a decree for any sum received by the defendant in excess of her dower, the defendant set up a claim for interest on the unpaid dower-debt, and it being found that a portion of it remained unpaid, interest at six per cent. per annum was allowed on that amount.

Hamira Bibi v. Zuhaida Bibi .. 681

MUHAMMADAN LAW—*Gift—Gift by deed of trust—Act No. XVIII of 1876 (Oudh Laws Act), section—Mamdani of "sighe."—Delivery and acceptance of subject of gift not proved—Act No. IV of 1882 (Transfer of Property Act)—Act No. II of 1882 (Indian Trusts Act)—Act No. XVII of 1876 (Oudh Laws Act), section 21 cl. 2—Legitimacy, proof of, declaration—Evidence Act (I of 1872), section 32 cl. 5—Declarations admitted in evidence—Civil Procedure Code, 1877 and 1882, section 141; 1908, order XIII, rule 4—Judicial authentication of information—Cross-examination of witness.*—In accordance with the Oudh Laws Act (XVIII of 1876), which is the case in which among Muhammadans, the Muhammadan law is to be applied, the word "gift" includes a gift made by a deed of trust to a trustee.

A Muhammadan made a settlement, the parties to which were himself of the first part, his wife of the second part, and his wife and her father of the third part (the trustee), after reciting that Rs. 40,000 was due by the settlor to his wife on account of her dower, and that it had been agreed between the parties that the settlement should be in full satisfaction of the dower-debt, witnessed that for the consideration stated the settlor granted certain properties to the trustees upon trust to pay the net incomes of the properties to his wife for her life and after her death upon trust for all the children of the settlor and his wife "living at the time of his decease." The deed was never executed by the wife, and there was no evidence, independent of the deed, to show that any agreement was ever entered into between the settlor and his wife that she would accept the provision made for her in the settlement in satisfaction and discharge of the unpaid balance of her dower, and she never elected in his lifetime to take the benefits conferred on her by the deed in lieu of it.

Held that the conveyance to the trustees was a purely voluntary gift and was void by Muhammadan law unless accompanied by a delivery of possession such as the subject of the gift was susceptible of. Subsequent election could not be held to be a substitute for the original consideration.

Chaudhri Mahdi Hasan v. *Muhammad Hasan*, I. L. R., 28 All., 439 (449); L. R., 33 I. A., 78 (86) and *Khajooroonissa* v. *Rooseen Jehan*, I. L. R., 2 Calc., 184; I. R., 3 I. A., 201, followed.

The rule of law laid down by those authorities was not altered or qualified by the combined provisions of the Transfer of Property Act (IV of 1882) and the Indian Trusts Act (II of 1882), so as to make registration a substitute for delivery of possession. Both of those Acts were passed long before the first of those authorities was decided.

In a suit to enforce a mortgage executed by the widow of the settlor of property dealt with by the deed—

Held that during the life of the donor the evidence did not show that anything was done by him which amounted to delivery of possession of the properties, nor was anything done by the trustees or the wife alone amounting to proof of the new relation of

Page.

the gift or of an election to take under the deed All her conduct and actions were entirely inconsistent with any such intention on her part The trustees never entered under and by virtue of the trust deed into the receipt of the rents or income of the property comprised in the settlement, and consequently there was no satisfactory proof that the possession of the property the subject of the gift was ever delivered by the settlor to the trustees That being so the gift according to the Muhammadan law was void, and the property vested in was therefore invalid and binding instrument and ... 97

This settlement made on a gift to ... by the wife, she must be taken to have known the contents and effect of it, being a part of the administrative duties of ... appointed local chairman or ... by the Code ... 1885, ... upon the public officials ... whom ... 97

... Ouseph v. Mahomed Kutty and Sons" ... 97

On a question as to the ... of one of the settlor's sons—

Held on the evidence that he was the illegitimate son of the settlor, and was acknowledged by him to be such the son of ... marriage 97

The Muhammadan law ... to ... as laid down in *Muhammad Allahdi Khan v. Muhammad Ismail Khan*, I. L. R., 10 All., 537, and *Mahomed Ameer Ali Khan v. Lath Begum*, L. R., 8 Calc., 432; I. L. R., 9 Calc., 8, and that as to ... of regular form statement made in documents by a member of the family in *Anjuman Ara Begum v. Sadik Ali Khan*, 2 Oudh Cases, 125, and *Bagir Ali Khan v. Nijamun Ara Begum*, I. L. R., 25 All., 386; L. R., 30 I. A., 34, followed. 97

Their Lordships' comment upon the long duration of this litigation, namely, that such a case were ... to any judicial system, and there was no reason to think that they were not to a large extent avoidable" ... upon the undue prolongation of the cross-examination of witnesses by breaking up into detached portions, than which no better system could be devised to expose witnesses to the risk of being tampered with and to promote the fabrication of false evidence. 97

A presiding Judge should endorse with his own hand a statement that a document proved or admitted in evidence was proved against or admitted by the person against whom it was proved, as laid down in section 141 of the Civil Procedure Code of 1877 and 1882 and practically re-enacted in order XIII, rule 4 of the rules and orders passed under the Civil Procedure Code, 1908. With a view of insisting on the observance of the above-mentioned provisions of these Statutes, their Lordships will, in order to prevent injustice, be obliged, in future on the hearing of Indian appeals, to refuse to read or permit to be used any document not endorsed in the manner required 97

Sadik Hussain Khan v. Hashim Ali Khan 627

MUHAMMADAN LAW, *See* Act No. IV of 1882, sections 132 and 120 212

——— *See* Mortgage 92

——— *See* Pre-emption 201

MUAFI LAND, *See* Pre-emption 200

NOTICE, *See* Act (Local) No. X of 1900, section 132 455

OATH, *See* Act No. X of 1873, sections 5, 6 and 13 49

OCCUPANCY-HOLDING, *See* Act (Local) No. II of 1901, section 32 .. 325

Page.

OFFENCES of the same kind committed in respect of different persons, *See* Joinder of cases 457

PARTITION. *See* Act (Local) No. III of 1901, sections 110, 111 and 112.. 115

——— *See* Act (Local) No. III of 1901, section 111 (1) (b) .. 70

——— *See* Act (Local) No. III of 1901, sections 112, 114, 253(b) .. 809

——— *See* Act (Local) No. III of 1901, section 253, clause (b) .. 248

——— *See* Civil Procedure Code (1908), order II, rule 2 .. 217

——— *See* Hindu law 33

PARTITION DEED, *See* Act No. II of 1899, schedule I, article 55 .. 56

PENALTY, *See* Act No. IX of 1872, section 74 52

POWER OF ATTORNEY. *See* Act No. X of 1877, section 3, 3rd and 10 .. 131

PRACTICE, *See* Act No. XVIII of 1879, section 14 182

——— *See* Act No. IV of 1882, section 57 688

——— *See* Civil Procedure Code (1908), order XLVIII, rule 9 .. 250

——— *See* Criminal Procedure Code, section 476 495

——— *See* Jurisdiction 427

——— *See* Title, suit for declaration of 440

PRE-EMPTION—*Mortgage of property prior to the passing of Act No. IV of 1882—Government revenue paid by mortgagee—Institution of pre-emption to pay the amount of the redemption money from proceeds of obtaining possession of property.*] Under a usufructuary mortgage which was liable to pay the Government revenue, and if he failed to do so, the mortgagee was to pay it and was entitled to recover the sum from the mortgagor and hold the property. The mortgagor failed to pay the revenue, which accordingly was paid by the mortgagee. Subsequently the property was sold to the mortgagee for the amount of the mortgage plus the amount of the revenue paid by the mortgagee, who went to possession thereof. *Held* that the pre-emption suit filed to pay the amount paid by the mortgagee for the revenue was maintainable in the circumstances of possession of the property as well as the discharge of the mortgage.

Bhoj Raj v. Ram Narain 520

——— *Muhammadan law—Talab-i-ishhad—Hibah* that a Muhammadan pre-emptor cannot validly make the demand—*talab-i-ishhad* by letter when he is in a position to go and meet the vendee.

Muhammad Khalil v. Muhammad Ibrahim .. 201

——— *Transfer—Mortgage—One of the forms "mukharaj" not sufficient to constitute a mortgage.*] The material portion of a document executed by the borrowers to secure a sum was as follows:—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right without waiting for the expiry of the time fixed, to the suit and to recover their dues from the property mortgaged (*Mukharaj*) and if the creditors in default do not sue for the amount and interest then the heirs of creditors shall not be entitled to recover their dues under the deed from any other property or myself excepting the property mortgaged (*Mukharaj*)."

A claim for pre-emption was brought based upon this document which was claimed to be a sale, or a usufructuary mortgage.

Held by RACHARDS, C.J., that it was necessary, in order to distinguish the transaction evidenced by the document in question from what is ordinarily called a "simple mortgage." On a consideration, however,

Page

of the mahbharri it was held not to include mortgages which did not involve a change of possession

Held by TUDBALL, J., that the document under consideration did not amount to mortgage, but it merely created a charge on the property referred to therein *Dalip Singh* v. *Bahadur Ram*, I. L. R., 34 All., 195, referred to.

Khurshed Ali v. Ahlad Mirza 331

PRE-EMPTION—*Wajib-ul-arz*—*Owners of transfer within limit*—*Co-sharers*, *Held* that the words of the "wajib-ul-arz" quoted above [and] assisted to rebut the right they claimed to the Chahi Bara, which constituted one length of land, was not a custom in accordance with the rules of the wajib-ul-arz, so as to give the plaintiffs a right to pre-empt under the terms of the wajib-ul-arz, which declared a right of pre-emption to exist, only as a right of co-sharers, in favour of other co-sharers in the village.

Nathoo Mal v. *Ganga Bishan*, I. L. R., 17 All., 147, *Nanak Ram* v. *Fazl Subhan Khan*, I. L. R., 27 All., 149, *Bagbanchi Pandey* v. *Kashaya Lal*, W. Ny. Notes, 1907, p. 61, *Jhanda Singh* v. *Nagendra Nath*, I. A. L. J., p. 240, and *Ram Lal* v. *Bhola Ram*, 2 Punjab Cases, 1909, referred to. *Nathoo Mal* v. *Ganga Bishan*, I. L. R., 30 All., 339, not followed.

Mahadeo Prasad v. Jaggo (or Gir) 200

——— *Wajib-ul-arz*—*Custom*—*Effect of partition*—

The wajib-ul-arz of the village was supplemented during the time when the village was in the possession of the plaintiffs and the petitioner jointly by the following entry:—

Held that the entry was not a custom in accordance with the wajib-ul-arz, and therefore [illegible] which could not [illegible] Bhagwan Singh v. Kalka Singh, I. L. R., 32 All., 290, referred to.

Mohammad Mumtaz Khan v. Raghubar Dayal .. 27

PRELIMINARY DECREE in foreclosure suit for Rs. 5 allowing redemption on payment of Rs. 5 or Rs. 500 in default, See Civil Procedure Code (1908), order XXXIV, rules 3 and 5 368

PRESUMPTION, See Second Appeal 124

PRIMOGENITURE, See Act No. I of 1876, sections 8 and 10 .. 552

——————— See Hindu law 590

PRINCIPAL AND AGENT, See Act No. X of 1877, sections 8, 9 and 10 .. 191

PROCEDURE, See Act No. IX of 1887, section 17 426

——————— See Civil Procedure Code (1908), order XI, rule 21 .. 6

——————— See Criminal Procedure Code, section 439 312

PROPRIETARY TITLE, Qualified—See Act (Local) No. II of 1901, sections 28 and 177 (c) 103

PUBLICATION, See Copyright 484

PUISNE MORTGAGEE, rights of, See Civil Procedure Code (1908), order XXXIV, rules 4 and 5 368

REDEMPTION OF MORTGAGE, See Mortgage 148, 540

REGISTRATION, See Act No. I of 1872, section 70 1

——————— See Act No. XVI of 1908, sections 17 and 49 .. 300

——————— See Civil Procedure Code (1908), order XXIII, rule 3 .. 75

Page.

REGISTRATION OFFICER, *See* Act No. XVI of 1908, sections 32 and 37 354

REGULATIONS—1793—I, *See* Construction of document 570

——————————1806—XXXI, section 6, *See* Construction of document .. 230

——————————1806—XVII, *See* Construction of document 570

——————————1800—XVII, *See* Mortgage 97

——————————1829—X, *See* Lunatic 494

RELEASE, *See* Act No. II of 1903, schedule I, Article 61 56

RELINQUISHMENT, to save litigation, *See* Family Settlement .. 338

——————————, not binding on two brothers, *See* Family Settlement .. 338

REMAND, *See* Act (Local) No. II of 1903, section 103 181

——————*See* Act (Local) No. II of 1903, section 103 333

——————*See* Civil Procedure Code (1908), section 151 109

RENT, *See* Act (Local) No. II of 1903, sections 3, 6 285

RES JUDICATA, *See* Civil Procedure Code (1908), order XXII, rule 9 .. 200

RESTITUTION, *See* Civil Procedure Code (1908), section 144 .. 210

——————————*See* Civil Procedure Code (1877), section 144 .. 200

REVENUE. Covenant to pay—, *See* Construction of document .. 248

REVENUE AUTHORITIES, certain Police Report made of plaintiff's property, *See* Libel, suit for 440

REVIEW OF JUDGEMENT, *See* Civil Procedure Code (1908), order XLVIII, rule 9 180

——————————————*See* Criminal Procedure Code, section 369 .. 384

REVISION, *See* Act No. VII of 1887, section 25 170

——————*See* Criminal Procedure Code, section 476 605

RULES OF COURT, Chapter VII, rule 3, *See* Criminal Procedure Code, section 369 384

SALE, *See* Act No. IX of 1872, section 74 52

——*See* Act No. I of 1877, section 27 184

——*See* Act No. IV of 1882, section 55 (1) (b) 204

——in execution of decree, *See* Civil Procedure Code (1908), order XXI, rule 90 308

SALE DEED, *See* Suit for cancellation of document 212

SANCTION TO PROSECUTE, *See* Criminal Procedure Code, section 195 (1) (c) 102

SEARCH OF HOUSE, *See* Criminal Procedure Code, section 165 .. 14

SECOND APPEAL.—*Finding of fact—Burden of proof—Suit by husband on mortgage executed by wife—Wife's application to the mortgagee—Presumption.* Held that the question whether a husband, who sues on a mortgage executed by his wife, has paid the consideration, or is or is not the true owner of the mortgage money, is a question of fact, and (2) that where a person suing implicates the mortgagee (who was his wife) as a defendant and his only proof was a statement that he was a nominal purchaser that the plaintiff's between himself and his wife existed. 1

Dujjo v. Sham Lal 1

SECONDARY EVIDENCE, *See* Evidence 111

SECURITY for default of judgment-debtor, *See* Civil Procedure Code (1908), section 145, order XXXIV, rule 14 347

Page.

SECURITY for keeping the peace—*Criminal Procedure Code, section 107*—*Nature and quantum of evidence necessary before passing order for security*. There must be definite evidence in the case of any and every person charged under section 107 of the Code of Criminal Procedure, that there is danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that they are indulging in feeling of hostility towards another body of persons *Queen Empress v Abdul Kadir*, I. L. R., 9 All., 468, referred to

Emperor v Shambhu Nath 408

——————to be of good behaviour, *See* Criminal Procedure Code, section 110 303

——————Mode of enforcement of—*See* Civil Procedure Code (1908), section 148; order XXXIV, rule 14 327

SET-OFF, *See* Civil Procedure Code, 1908, order XXI, rule 18 659

SIR LANDS, *See* Act (Local) No II of 1902, section 18A 223

SPECIFIC PERFORMANCE, *See* Guardian and minor 430

STAMP, *See* Act No II of 1899, schedule I, article 55 56

——————*See* Act (Local) No. II of 1903, section 17 351

——————*See* Evidence 404

STAMP DUTY on a pauper's plaint, *See* Civil Procedure Code (1908), order XXXIII, rules 10 and 11 460

STAY OF EXECUTION, *See* Act No VII of 1913, section 107 .. 497

SUBROGATION, *See* Mortgage 502

SUCCESSION, *See* Act No. I of 1838, sections 8 and 10 559

——————*See* Act (Local) No. II of 1901 325

——————*See* Act (Local) No. II of 1901, section 22 197

——————*See* Hindu law 117, 410, 500

SUIT. Dismissal of—*See* Civil Procedure Code (1908), order IX, rule 2 .. 857

——Dismissal of ——. *See* Civil Procedure Code (1908), order XI, rule 21 5

——Valuation of——, *See* Civil Procedure Code (1908), order XXI, rule 68 72

——by minor for possession of property purchased, *See* Minor .. 104

——for cancellation of document—*Sale-deed—Alleged illegality of transaction—Sale by one deed of fixed rate and occupancy holdings*. The plaintiff by one and the same sale-deed purported to transfer (1) a fixed rate holding and (2) part of an occupancy holding. *Held* that he was not entitled to a decree setting aside the sale-deed merely because part of the property covered by it was by law not transferable.

Bajrangi Lal v Ghure Rai 232

——for ejectment. *See* Act (Local) No. II of 1901, sections 58 and 147(c) 465

——for money had and received, *See* Act No IX of 1908, schedule I, article 62 678

——for redemption of mortgage. *See* Mortgage 148

——for redemption, *See* Civil Procedure Code (1877), section 583 .. 103

——for specific performance, *See* Act No. I of 1877, section 27 .. 184

——for specific performance of contract to sell and for possession. *See* Act No. VII of 1870, section 7, clauses v and x 292

——to redeem by a person whose name is recorded in revenue papers *See* Mortgage 411

	Page
SUIT to set aside decree against a minor, *See* Minor	482
——to set aside a decree on the ground of fraud—*What constitutes fraud—Act No. IV of 1882 (Transfer of Property Act) section 90—Application for a decree under section 90 without information court of previous refusal to grant such a decree*] Certain mortgagee instituted a suit for sale on a mortgage and also asked in their plaint for a personal decree against the mortgagors under section 90 of the Transfer of Property Act, 1882. The court in that suit granted the plaintiffs a decree for sale but refused them the decree asked for under section 90. Some years afterwards the plaintiffs again applied for a decree under section 90. Notice of this application was only served upon the judgment-debtors. They did not appear, and the court granted a decree, but limited it to the assets of the deceased mortgagor. The judgment-debtors then filed a suit to have this decree set aside on the ground of fraud, the fraud alleged being mainly that the decree-holders had not brought to the notice of the court the fact that they had once before applied for and been refused a decree under section 90.	
Held that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to fraud which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act.	
RAM RATAN LAL v. BHOLA RAM	7
——transferred from Subordinate Judge with Small Cause Court powers to Munsif, *See* Act No. IX of 1887, section 27	426
TALUQDAR, *See* Act No. I of 1869, sections 8 and 10	564
TITLE, Suit for declaration of—*Transfer of estate made to plaintiff by widow of Oudh talugdar in possession as heir of her husband—Transfer made with consent of all the then existing next reversioner—Refusal of revenue authorities to record name of plaintiff as proprietor—Title set up by defendant under alleged will of deceased talugdar, which had found by first court not to have been executed—Talugdar found to be sane—Effect of non-defendant's admission by him during hearing of appeal of the want of title—Practice—Pleading to constitute appeal*	496
——which related to the transfer to the plaintiff of an impartible estate in Mauzah by the widow of an Oudh talugdar, in possession of his estate for a Hindu widow's interest under the Mitakshara law. The transfer was made with the consent of the only next reversioner in esse on the date of the execution of the deed of transfer who had attained	564
——. The defendant set up a title under an alleged will of the deceased talugdar. In a suit brought for a declaration of the plaintiff's title to the estate in consequence of the refusal of the Revenue authorities to have his name recorded as proprietor, the subordinate Judge held that the defendant had no title, as the deceased husband had never executed the alleged will, and that the transfer to the plaintiff was valid. On the hearing of an appeal to the Judicial Commissioner's Court by the defendant, he admitted the correctness of the first court's decision as to his want of title	
Held that the Court of the Judicial Commissioner was wrong in then allowing the appeal and dismissing the suit on the ground, that the widow had no power to transfer the estate. The defendant having no title had no interest which entitled him to support the appeal, which should have been dismissed on his admission.	
CHANDRIKA BIKHSH SINGH v. INDAR BIKRAM SINGH ..	440
THEFT, *See* Act (Local) No. II of 1901, section 124	40

	Page.
TRANSFER, *See* Act No. XLV of 1860, section 123	284
——*See* Pre-emption	361
——————of estate made to plaintiff by widow of Oodit Tulsigeer in possession as heir to her husband, *See* Title, suit for declaration of,	440
——————made with consent of all the then existing next reversioners, *See* Title, suit for declaration of	440
TRUST, *See* Mortgage	209
——*See* Mohammadan law	627
——*See* Will	214
"VALUABLE SECURITY", *See* Act No. XLV of 1860, sections 30 and 467	440
VALUATION of appeal, *See* Civil Procedure Code, 1908, section 110 ..	448
——————of suit, *See* Civil Procedure Code (1908), order XXI, rule 3)	75
VENDOR'S LIEN, *See* Act No. IV of 1882, section 55 (4) (b) ..	204
VOLUNTARY LIQUIDATION, *See* Act No. VII of 1913, section 207. ..	407
WAIVER, *See* Pre-emption	27, 270
——————Value of——as evidence, *See* Act No. I of 1870, sections 8 and 10	502
WARRANT OF ARREST, *See* Act No. XLV of 1860, section 225B ..	509
——————————for search of house, Legality of——, *See* Criminal Procedure Code, section 103	14

WILL—*Construction of document—Dedication of property for worship—Devotee by birth—Right after decease expressed—Trust*—A relative who owned a few houses left one house to one of his two daughters and the rest of his own and ancestral property, with a recital by him as well that after the disposition,—

> "In the other dwelling house containing of three sections of The first section including the shop etc. both the executors aforesaid should reside, pay up my loans and attend on them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo in the ways given in *Nirnay Pancham, Ram Naam, Jnanas Ashtanti, Narsinha, Shiva ate, Dhanurmas* and *Gaya* festivals and look after its repairs. After this is done both the executors should put down receipt and disbursement account of the income monthly and after deducting the above expenses should divide the profits between them in half and half and should settle receipts and acquittances as between themselves.
>
> None of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be utterly null and void."

Held, that the will created a trust and the only manifest interest given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed.

——Murlidhar v. Dowan Chand	214
——————Construction of, *See* Hindu Law	446
——————of Hindu widow in possession of her husband's estate, *See* Hindu law	443
WINDING UP, *See* Act No. VI of 1882, sections 61, 122, 191 ..	347
WITNESS, *See* Civil Procedure Code (1908), order XLI, rule 27 ..	191
——————Cross-examination of——, *See* Mohammadan law ..	627
ZAMINDARI, Sale of——, *See* Execution of decree	50

THE
INDIAN LAW REPORTS
Allahabad Series

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

1915
July, 1.

RAJ MANGAL MISIR AND OTHERS (PLAINTIFFS) *v.* MATHURA DUBAIN AND ANOTHER (DEFENDANTS).*

Act No. I of 1872 (Indian Evidence Act), section 70—Act No. XVI of 1908 (Indian Registration Act), section 60(3)—Admission—Endorsement of registering officer not evidence of admission of execution of document.

The "admission" referred to in section 70 of the Indian Evidence Act is an admission in the course of proceedings in which the admitted document is produced, for example, makes the pleadings or by a party himself in his examination. The certificate of admission of execution endorsed by the registering officer upon a document registered by him cannot be used as an "admission" of execution within the meaning of this section.

THIS was a suit for sale upon a mortgage, dated the 3rd of February, 1888, for Rs. 251. The suit was instituted on the 10th of August, 1909, and, it being alleged that no payments had been made on account of either principal or interest, the amount claimed was Rs. 1,884. In the original suit a decree was passed *ex parte* as against both defendants—one the widow of the alleged mortgagor, the other a transferee of the mortgaged property. The mortgage in suit was proved by the evidence of one Baldeo, a marginal witness who spoke to the signature of the mortgagor Bandhu Dube as well as his own. This decree was, however, set aside at the instance of the first defendant and the case was re-heard. Meanwhile the witness Baldeo died. At the second hearing the witness produced to prove the document failed to establish his acquaintance with the hand-writing of Baldeo, and the court of first instance, holding

* Second Appeal No. 688 of 1914, from a decree of E. H. P. Rose, Additional Judge of Gorakhpur, dated the 24th of April, 1914, confirming a decree of Harbandhan Lal, Subordinate Judge of Gorakhpur, dated the 17th of February, 1914.

1915

RAI MANGAL MISIR v. MATHURA DUBAIN.

that the mortgage in suit had not been proved, dismissed the plaintiffs' claim, and this decree was upheld in appeal. The plaintiffs thereupon appealed to the High Court, urging in the first place, that the evidence of Baldeo given at the first trial could be used as evidence at the second, and next, that the Registrar's certificate of admission of execution on the document could be used against the defendants as an admission within the meaning of section 70 of the Indian Evidence Act, and therefore no proof of execution was necessary.

Mr. *A. P. Dube*, for the appellants.

Munshi *Iswar Saran* (for whom Pandit *Krishn Nath Katju*), for the respondents was not called on to reply.

RICHARDS, C. J., and PIGGOTT, J.:—This appeal arises out of a suit on foot of a mortgage, dated the 3rd of February, 1888. The original amount secured was Rs. 251. The amount claimed for principal and interest is Rs. 1,884. There is no allegation of any payment upon foot of principal or interest from the time of the execution of the deed, and the suit was not instituted until the 10th of August, 1909, that is to say, in or about twenty-one years after the alleged execution of the mortgage. Defendant No. 1 is the widow of the alleged original mortgagor, one Bandhu Dube. Defendant No. 2 is alleged to be a subsequent transferee at an auction sale held on foot of another mortgage alleged to be prime to the mortgage in suit. An *ex parte* decree was obtained on the 30th of November, 1909. This *ex parte* decree was set aside on the 21st of January, 1913, on the application of Musammat Mathura, the defendant No. 1, who certified the court that she had not been served with the process. When the court was granting the decree *ex parte*, a witness of the name of Baldeo was produced, who stated that he was the sole surviving attesting witness to the mortgage and that he had seen the bond executed by Bandhu. He identified the signature of Bandhu and his own. The *ex parte* decree having been set aside, as already stated, the plaintiff was called upon to prove his case as in a contested suit. Meanwhile Baldeo had died. A witness was produced, who attempted to prove that the signature of Baldeo was in the hand-writing of the latter. He was unable to say that he had ever seen Baldeo write or that he had ever

1915

RAI MANGAL MISIR v. MATHURA PERSAD.

received documents purporting to have been written by Baldeo in answer to documents written by him or that documents written by Baldeo had in the ordinary course of business been habitually submitted to him. In other words, he was unable to say that he was "acquainted" with the hand-writing of Baldeo. Under these circumstances the court of first instance held that the plaintiffs had failed to prove the mortgage sued upon and dismissed the suit. The lower appellate court confirmed the decree of the court of first instance.

In second appeal to this Court it has been contended that the evidence of Baldeo given at the time the *ex parte* decree was granted should have been admitted as evidence of the due execution of the document. Section 33 of the Evidence Act provides, amongst other things, that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or at a later stage of the same judicial proceeding the truth of the facts which it states when the witness is dead. It is under this section that the appellants contend that the evidence of Baldeo should have been admitted by the courts below. There is, however, a proviso to the section that before the evidence of a deceased witness can be admitted, it must be shown that the adverse party in the first proceedings had the opportunity of cross-examination. So far as Musammat Mathura is concerned it is clear that she had no such opportunity, it having been found by the court that she was never served with the process prior to the granting of the *ex parte* decree. It is contended that as defendant No. 2 did not apply to have the *ex parte* decree set aside, it must be taken that he had an opportunity of cross-examining the witness. The affidavit of the process-server made in the absence of defendant No. 2, when the suit was first instituted, is relied on. In our opinion this is not sufficient. If it was intended to use the statement of Baldeo as evidence against defendant No. 2, it would at least have been necessary to prove, by the oral evidence of the witness who had served him with the process, the fact of service. It was not sufficient to refer to the ordinary affidavit of service made by the process-server. It is unnecessary to decide whether if the process-server had been produced, his evidence would have been sufficient to entitle the

1915

RAJ MANGAL MISIR v. MAHMUDA DUBAIN

plaintiffs to put in the evidence of Baldeo, but it seems to us clear that without the evidence of the process-server the evidence of Baldeo was not admissible against either of the defendants. There was no evidence of the execution or due attestation of the document sued upon.

It was next contended that the certificate of the Registrar endorsed upon the bond proves an admission by Bandhu that he executed the document, and reliance is placed upon section 70 of the Evidence Act. This section provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. It seems to us that the admission referred to in this section is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The contention is that the certificate contains an admission by Bandhu and that under the provisions of section 60, clause (3), of the Indian Registration Act, 1908, the certificate of the Registrar is sufficient proof that Bandhu made the admission. In our opinion this contention goes much too far. The certificate endorsed by the registering officer upon a document which requires registration is evidence that all the provisions of the Registration Act have been duly performed.

It may be said that the plaintiffs have been somewhat unfortunate. They have themselves to blame in the first place because they waited so long before instituting their present suit. But for the period of grace allowed by the recent Limitation Act the suit would have been barred by time. If the finding of the court below was correct that the defendants or at least one of them was not duly served this also was the fault of the plaintiffs.

The appeal fails and is dismissed with costs.

Appeal dismissed.

1915
July, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

KISHAN LAL (PLAINTIFF) *v.* SULTAN SINGH (DEFENDANT) *

Civil Procedure Code (1908), order XI, rule 21—Procedure—Plaintiff under suspicion of suppressing documents relating to the matter at issue—Discount of suit.

Where a plaintiff had given the court strong grounds for believing that he was keeping out of the way documents which would throw light on the subject matter of the suit, but there had been an order made for discovery or inspection of documents, it was held that the court was not justified in dismissing the suit, purporting to act under order XI, rule 21, of the Code of Civil Procedure.

IN this case the suit of the plaintiff was thrown out as the first court was strongly of opinion that he had in his possession certain documents which would throw light on the matter in dispute. A visit was paid to his house, but nothing bearing on the case was found there. The other side had obtained an order for discovery, but the court dismissed the suit, purporting to act under order XI, rule 21, of the Code of Civil Procedure. The lower appellate court confirmed the decree. The plaintiff appealed.

Dr. *Surendra Nath Sen*, for the appellant.

The respondent was not represented.

RICHARDS, C. J., and PIGGOTT, J. :—This appeal arises out of a suit brought to recover money alleged to be due on four of four different mortgages. In the court of first instance the learned Munsif was strongly of opinion that the plaintiff had in his possession or power certain documents which would throw light on the matter in dispute. With the consent of the plaintiff a visit was paid to the latter's house, and a number of books were found, but most of them likely to have a bearing on the case were not there.

After examining the plaintiff, the court dismissed the suit, purporting to do so under the provisions of order XI, rule 21. The lower appellate court confirmed the decree of the court of first instance. On the real merits of the case we do not feel much sympathy with the plaintiff. There is strong ground for suspecting that he was keeping back books and documents which he ought to have produced. The question, however, which we have to decide is whether the court was entitled under the

* Second Appeal No. 974 of 1913, from a decree of P. S. Tailor, Additional Judge of Farrukhabad, dated the 3rd of April 1913, confirming a decree of Piari Lal, Munsif of Kannuj, at Sarai Miran, dated the 30th of January, 1913.

1925

KISHAN LAL v. SULTAN SINGH.

circumstances to dismiss the suit in the way it did. Order XI, rule 21, is as follows :—"Where any party fails to comply with any order to answer interrogatories, or for discovery, or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution." The rule concludes :—"and the party interrogating, or seeking discovery, or inspection may apply to the court for an order to that effect and an order may be made accordingly." If we look to the earlier rules of the same order it is quite clear that the learned Munsif and the lower appellate court misapplied the rule. If a party wishes to get what is called "discovery of documents" from the other side, he makes an application under rule 12 asking the court to order the other side to make discovery on oath of the documents which are or which have been in his possession or power relating to the matters in question. If the court thinks fit, it makes an order for discovery. The party upon whom this order of discovery is made is bound to comply with the order. The penalty for not complying with the order is that which is specified in order XI, rule 21. Just in the same way after a party has admitted the possession of a document, the court can make an order for inspection, and if the court's order is disobeyed, the party complaining of the disobedience can apply for the enforcement of the order according to the provisions of order XI, rule 21. In the present case there was no order for discovery or inspection. We may point out to the court below that if it was of opinion that the party was keeping back documents, the court was entitled to draw adverse inferences against the party withholding or keeping back documents. In our opinion the court was not entitled to dismiss the suit under the provisions of order XI, rule 21. We accordingly allow the appeal, set aside the decree of both the courts below, and remand the case to the court of first instance through the lower appellate court, with directions to restore the case under its original number in the file and to proceed to hear and to determine the same according to law. As we think that the appeals were entirely due to the conduct of the plaintiff we make no order as to costs.

Appeal allowed and cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1915
July, 7.

RAM RATAN LAL AND OTHERS (DEFENDANTS) *v.* BHURI BEGAM AND ANOTHER (PLAINTIFFS) AND MOHAMMAD YUSUF KHAN AND OTHERS (DEFENDANTS).*

Suit to set aside decree on the ground of fraud—What constitutes fraud—Act No. IV of 1882 (Transfer of Property Act), section 90—Application for a decree under section 90 without informing court of previous refusal to grant such a decree.

Certain mortgagees instituted a suit for sale on a mortgage and also asked in their plaint for a personal decree against the mortgagors under section 90 of the Transfer of Property Act, 1882. The court in that suit granted the plaintiffs a decree for sale, but refused them the decree asked for under section 90. Some years afterwards the plaintiffs again applied for a decree under section 90. Notice of the application was duly served upon all the judgment-debtors. They did not appear, and the court granted a decree, but limited it to the assets of the deceased mortgagor. The judgment-debtors then filed a suit to have this decree set aside on the ground of fraud, the fraud alleged being mainly that the decree-holders had not brought to the notice of the court the fact that they had once before applied for and been refused a decree under section 90.

Held that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to obtain a personal decree, even assuming that the neglect was wilful, could not amount to fraud which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act.

THE facts of this case were as follows :—

The defendants brought a suit for sale upon a mortgage executed by the predecessors in title of the plaintiffs. To that suit, among other defendants, the plaintiffs were impleaded as defendants. The defendants had not only asked for a decree for sale of the mortgaged property but also for a simple money decree. The latter prayer was refused and a decree for sale was passed. The decree-holders, some years afterwards, after exhausting the mortgaged property, applied for a decree under section 90 of the Transfer of Property Act. Notice of the application was served on the judgement-debtors, but no one appeared to oppose the application. A decree under section 90 was therefore passed against all the judgment-debtors. The decree-holders proceeded to attack a house. The main judgement-debtors appeared and objected on the ground that they were agriculturists and the house could

* Second Appeal No. 600 of 1914 from a decree of S. Tabar, Additional Judge of Farrukhabad, dated the 14th of April, 1914, confirming a decree of Muhammad A. Ansari, Munsif of Kamalganj, dated the 22nd of May, 1913.

1915

RAM RATAN LAL v. BHURI BEGAM.

not be sold in execution of the decree. The objection was disallowed. Thereupon the present suit was instituted by the present plaintiffs on the ground that they had no notice of the application for a decree under section 90 of the Transfer of Property Act, which as a matter of fact could not be passed, being barred by limitation. The further ground was that it had also been disallowed once and the decree was therefore obtained by fraud. The courts below gave the plaintiffs a decree. The defendants appealed to the High Court.

Dr *Surendra Nath Sen*, for the appellants, submitted that no fraud was proved in the case. The interests of the plaintiffs and other judgement-debtors were the same and the latter at least had knowledge of the application for decree under section 90 of the Transfer of Property Act. The judgement-debtors in this case allowed an *ex parte* decree to be passed and did not appeal against it. The present suit was brought upon the ground that the decree was obtained by fraud. When, however, the decree was put into execution no such plea was taken. The fraud alleged was that the decree was barred by limitation. Even assuming this was so the mere presentation of a time-barred application does not constitute fraud. This suit was therefore a suit to contest the validity of a decree passed by a competent court and if entertained would make the provisions of sections 11 and 47 of the Code of Civil Procedure nugatory. The right procedure was followed when the application was made and the suit therefore is barred by the rule of *res judicata*: *Mahomed Golab* v. *Mahomed Sulliman* (1), *Nil Madhab Roy* v. *Nuba Das* (2), *Munshi Mosuful Huq* v. *Surendra Nath Roy* (3), *Mavrochain* v. *Parsuram Maharaj* (4), *Janki Kuar* v. *Lachmi Narain* (5), *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (6), *Flower* v. *Lloyd* (7). No application having been made to set aside the decree, a suit did not lie; *Mungul Pershad Dichit* v. *Girja Kant Lahiri* (8), *Behari Singh* v. *Mukat Singh* (9),

(1) (1894) I. L. R., 21 Calc., 612.
(2) (1903) 12 C. W. N., 28 Notes.
(3) (1912) 16 C. W. N., 1032.
(4) (1911) 10 Indian Cases, 905.
(5) (1915) I. L. R., 37 All., 536.
(6) (1914) I. L. R., 41 Calc., 950.
(7) (1879) 10 Ch. D., 327.
(8) (1881) I. L. R., 8 Calc., 51.
(9) (1905) I. L. R., 28 All., 273.

1915

RAM RATAN LAL v. BIPIN BEHARI

Sheoraj Singh v. *Rameshar Nath* (1), *Kastura Kunwar* v. *Ganga Prasad* (2), *Ram Kirpal* v. *Rup Kuari* (3).

Dr. *S. M. Sulaiman*, for the respondent, submitted that the decree in the first suit could only be challenged by means of a separate suit and not by an application; *Radha Raman Shaha* v. *Pran Nath Roy* (4), *Kalian Singh* v. *Jagan Prasad* (5). In the present case the decree for money had once been refused and that fact was concealed from the court. The fact was very material and its suppression amounted to fraud: *Rajmohun Gossain* v. *Gourmohun Gossain* (6), *Subbaiyar* v. *Kallapvian Pillai* (7), *Madari Singh* v. *Ram Ratan* (8), *Lakshmi Narain Saha* v. *Nur Ali* (9). *Kedar Nath Pus* v. *Hemanta Kumari Debi* (10). Other grounds were also taken, viz that the respondents were kept in the dark about the application for a decree under order XXXIV, rule 6; but these questions had not been gone into.

RICHARDS, C.J.—This appeal arises out of a suit in which the plaintiffs sought to set aside a decree which the defendants had obtained under section 90 of the Transfer of Property Act on the allegation that the same was obtained by fraud. The material facts are practically undisputed. The defendants or their representatives brought a suit upon foot of a mortgage dated the 25th of October, 1893, and obtained a decree. They asked in that suit not only for a decree for sale of the mortgaged property but also for a personal decree. This latter part of their claim was disallowed. Some years afterwards the decree-holders applied to the court for a decree under section 90 of the Transfer of Property Act. Notice of the application was duly served on all the judgement-debtors. They did not appear, and the court granted the decree, but limited it to the assets of the deceased mortgagor. This is the decree which it is sought in the present suit to set aside. Later on, in execution of this decree, a house of the judgement-debtors was attached. The male judgement-debtors objected that the house could not be sold on the ground that they were agriculturists.

(1) (1902) I. L. R., 24 All., 282.
(2) Weekly Notes, 1907, p. 25.
(3) (1933) I. L. R., 6 All., 359
(4) (1901) I. L. R., 28 Calc., 476.
(5) (1915) 13 A. L. J., 102.
(6) (1880) 6 Mad. I. A., 91
(7) (1914) 22 Indian Cases, 560.
(8) (1914) 33 Indian Cases, 974.
(9) (1912) I. L. R., 38 C. le., 9.
(10) (1915) 18 C. W. N., 447.

1935

RAM RATAN LAL v. BEGAM BESAM

This objection was overruled. There was an appeal by the judgement-debtors, which was dismissed. Both the courts below have granted the plaintiffs a decree, setting aside the decree obtained by the defendants under section 90 of the Transfer of Property Act. The judgement of the court of first instance is a little misleading unless one reads it as a whole. When carefully considered, it is clear that the defendants practised no fraud on the plaintiffs to the present suit in respect of the service of notice of the application for the decree under section 90. The plaintiffs are *pardah nashin* ladies. It is quite impossible for any brigant to serve process of the court in any way which would violate the *pardah* of such ladies. When the court of first instance says that these ladies knew nothing about the decree under section 90, it does not mean that the defendants in the present suit were in any way responsible for their want of knowledge. The ladies were duly served with the notice, so also were the male members of the family. No objection was taken to the granting of the decree under section 90 and no application was ever made to set it aside. The male members, who were equally interested with the ladies in opposing the decree, evidently thought that there would be no chance of success. We find, however, when the house was attached in execution of that decree they opposed the sale on the ground that they were agriculturists.

We now come to the only fraud which is suggested in the present case. The fraud is that the defendants, (who then occupied the position of decree-holder) did not inform the court that, when the preliminary decree was being granted on foot of the mortgage, they had asked for a personal decree and that this had been refused upon the ground that having regard to the date of the mortgage and the position of the judgement-debtors a personal decree ought not to be granted. Two questions arise. First, whether it is open to a party to challenge an order which has been made between the decree-holder on the one side and the judgement-debtor on the other, even where no fraud is alleged or proved. It seems to me impossible to contend that where (in the absence of fraud) a matter has been decided in execution proceedings relating to the satisfaction of the decree, it is open to the parties to re-open matters which have been so decided by an independent suit. This

1915

RAM RAN LAL v. BHOJH BHOAM.

has been settled by numerous decisions of the various courts in India and also by their Lordships of the Privy Council.

Some attempt has been made to distinguish between what is called an *ex parte* decree or order and a decree or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made. In my judgement the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest.

The next question is as to the nature of the fraud which must be alleged and proved in order to entitle the plaintiffs to have the decree set aside. On this part of the case Dr. Sulaiman admitted, as I think he was bound to admit, that he could not claim to have a decree under section 90 set aside on any ground of fraud which would not have been sufficient to have a decree in a suit set aside.

A large number of cases have been cited on each side. On the part of the appellant the following cases were relied upon. *Mahomed Golab* v. *Mahomed Sulliman* (1), *Nil Mudhab Roy* v. *Naba Das* (2), *Munshi Mosuful Huq* v. *Surendra Nath Roy* (3), *Marachain* v. *Parsuram Maharaj* (4), *Janki Kuar* v. *Lachmi Narain* (5), and *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (6).

In the case of *Mahomed Golab* v. *Mahomed Sulliman* (1), PETHERAM, C. J., quotes, at page 613, from the case of *Flower* v. *Lloyd* (7).

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where a litigation to end if a judgement obtained in an act on fought out adversely

(1) (1894) I. L. R., 21 Calc., 612.
(2) (1905) 12 C. W. N., p. 28, Notes
(3) (1912) 16 C. W. N., 1093.
(4) (1911) 10 Ind. Cas., 905.
(5) (1925) I. L. R., 37 All., 532.
(6) (1914) I. L. R., 41 Calc., 960.
(7) (1879) L. R., 10 Ch. D., 327.

1915

RAM RATAN LAL v. BUCHA BEGAM.

between two litigants *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed on the first occasion, or that false answers had been given to interrogatories, or a mistaken production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained in this appeal the judgement in their favour, the present defendants in their turn might bring a fresh action to set that judgement aside on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternately *ad infinitum*."

In the case of *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1), JENKINS, C. J., quotes with approval SIR JOHN ROLT, L. J., in the case of *Patch* v. *Ward* (2):—

"The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtaining what decree by that contrivance."

In an earlier part of the judgement the learned Chief Justice says:—

"But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgement in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated."

On the other side also a number of cases have been cited, including a decision of their Lordships of the Privy Council in the case of *Rajmohun Gossain* v. *Gourmohun Gossain* (3). That was a case in which a party having expressly agreed not to appeal, in contravention of his agreement, presented an appeal and obtained a decree which he afterwards sought to set up against the other side. It is quite clear that this case was decided entirely upon its own facts and circumstances. The general law as to what constitutes sufficient allegation and proof of fraud to justify the setting aside of a decree in a previous suit was not discussed.

Special reliance was placed on a ruling of the Calcutta High Court in the case of *Lukshmi Narain Saha* v. *Nur Ali* (4). This decision was cited with approval by another Bench of the Calcutta High Court in the case of *Kedar Nath Das* v. *Hemanta Kumari Debi* (5). In this case a decree had been obtained against the

(1) (1914) I. L. R., 41 Calc., 920.
(2) (1867) L. R., 3 Ch App., 203
(3) (1859) 8 Moo. I. A., 21.
(4) (1911) I. L. R., 38 Calc., 926
(5) (1913) 18 C. W. N., 447

plaintiff *ex parte*. The plaintiff succeeded in having the *ex parte* decree set aside, but another *ex parte* decree was passed against him. The plaintiff then brought a suit to set aside that decree on the ground that the same had been obtained by means of false evidence. It would appear that the court held that on the mere allegation that the decree was obtained by false evidence the plaintiff was entitled to re-open the litigation. If we assume that no just distinction can be drawn between a person against whom a decree has been obtained without contest after due notice and a person who has appeared after notice and has been defeated after making the best fight he can, it seems to me that the decision of the learned Judges in the case cited omits to consider the great danger pointed out by THESIGER, L. J., in the case of *Flower* v. *Lloyd* (1). As the result of the decree of the learned Judges, if the plaintiff had succeeded in setting aside the decree on the ground that the evidence advanced by the plaintiff in that suit was false, what was there to prevent the defeated defendant instituting another suit to set aside that decree on exactly similar grounds? This decision does not appear to have met with the universal approval of the Calcutta High Court: see *Munshi Mosahal Haq* v. *Surendra Nath Ray* (2).

I would here like to point out that it is open to question whether a decree or order which has been obtained after due notice is very accurately described as "*ex parte*." It is hardly necessary to remark that an order obtained after notice is very different from an order obtained without notice.

In the present case it seems to me that the neglect to inform the court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act. The present suit is in reality an "appeal" against the decree of the court long after limitation. I would allow the appeal.

MUHAMMAD RAFIQ, J.—I find that the questions argued at the bar do not arise in this case. The arguments have proceeded on the

(1) (1879) L. R., 10 Ch. D., 327. (2) (1912) 16 C. W. N., 1002.

1915

RAM RATAN LAL v. RAM BHAJAN.

assumption that a personal decree under section 90 of Act IV of 1882 was obtained by the defendant appellant against the plaintiffs respondents. On reference to the record I find that no personal decree was passed against them, but a decree against them was passed in their representative capacity against the estate of Imtiaz Ali, deceased, one of the mortgagors. The contention for them challenging the decree as having been fraudulently obtained is based on the assumption of a personal decree and has no such decree was passed their contention fails. I would therefore allow the appeal.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of both the courts below are set aside and the suit is dismissed with cost in all courts

Appeal allowed.

APPELLATE CRIMINAL.

1915

July, 13.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

EMPEROR v. BRIKHBHAN SINGH AND OTHERS *

Criminal Procedure Code, section 165—Warrant for search of house—Resistance to police—Legality of warrant.

In the course of an investigation into a dacoity which had occurred in the Agra district, a circle inspector of the Mainpuri district sent a sub-inspector to the circle inspector concerned with a suggestion that the house in which one Nihal Singh lived in the Mainpuri district might be searched. The Agra circle inspector thereupon gave, as he said, written instructions to the sub-inspector who had been sent to him from Mainpuri to the effect that "the house of Nihal Singh be searched in connection with the dacoity at Nagla Murli, that he might be arrested for the sake of identification, and that the houses of those persons should also be searched who were suspected by the sub-inspector of receiving stolen property." Nihal Singh was not directly implicated by any one in the dacoity under investigation. When the police in pursuance of this order attempted to search the house where Nihal Singh was living, which belonged to Brikhbhan Singh his father-in-law, they were resisted by Brikhbhan Singh and his relations and friends and prevented from conducting the search or arresting Nihal Singh.

Held that the authority under which the police had attempted to make the search was invalid and the persons resisting them could not be convicted under section 332 of the Indian Penal Code. Whether or not these persons

* Criminal Appeal No. 450 of 1915, by the Local Government from an order of Pyare Lal Kapur, Assistant Sessions Judge of Mainpuri, dated the 19th of April, 1915.

might have been found guilty under other sections of the Indian Penal Code, e.g., sections 107, 395 or 142, was discussed at length during the evidence in the case.

1915

EMPEROR v. BRIJBHUKAN SINGH.

THIS was an appeal by the Local Government from an order of the Additional Sessions Judge of Mainpuri acquitting Brijbhukan Singh and others of various charges arising out of an attempt made by the police to search the house of Brijbhukan Singh, in which his son-in-law Nihal Singh, suspected of being concerned in a dacoity which had occurred in the district of Agra, was living.

The facts of this case are fully set forth in the judgement of the Court.

The Government Advocate (*Mr. A. E. Ryves*) for the Crown.

Mr. G. W. Dillon and Babu *Shambhat Sinha*, for the accused.

RICHARDS, C.J., and MUHAMMAD RAFIQ, J.:—Eighteen accused persons were put on their trial on charges of rioting, dacoity, wrongful restraint, and obstructing the police in discharging their duty. The learned Additional Sessions Judge acquitted the accused and Government have appealed. It appears that a dacoity had taken place at a place called Nagla Murli in the Agra district. Some sort of a conference had taken place at which the Deputy Inspector-General of Police was present. The persons attending this meeting appear to have been the Circle Inspectors of the Agra district and the surrounding districts. It was there decided that searches should take place at the houses of persons who were suspected of having been concerned in the dacoity. The result of this meeting was that Chunni Singh, one of the Circle Inspectors of the Mainpuri district, sent Muhammad Naim Khan, a Sub-Inspector of Jasrana (in the Mainpuri district), to Mahfuz Ali, one of the Circle Inspectors of the Agra district in whose circle the dacoity is said to have taken place. Mahfuz Ali says that he gave a written authority to Naim Khan to search the house of one Nihal Singh and arrest him. In cross-examination he stated:—"I wrote this that the house of Nihal Singh be searched in connection with the dacoity at Nagla Murli, that he might be arrested for the sake of identification, and that the houses of those persons should also be searched who were suspected by the Sub-Inspector of receiving stolen property."

It may be noted here that Muhammad Naim Khan had nothing to do with the investigation of the dacoity which had taken place

1915

EMPEROR v. BRIKHBHAN SINGH

at Nagla Murli It was outside his district, and so far as the evidence goes there is nothing to shew that Muhammad Naim Khan even knew what property had been stolen in the dacoity. It is here desirable to mention who Nihal Singh was. Nihal Singh was not a resident of the Mainpuri district. He had belonged to the Agra district. Proceedings had been taken against him in the year 1912 under section 110 of the Code of Criminal Procedure. He had been bound over, and his father-in-law Brikhbhan Singh, accused No. 2, had gone security for him. Whether it was that Brikhbhan Singh having gone security for his son-in-law wished to keep an eye upon him, or whether he was anxious that no false accusation might be made against him, the fact remains that Nihal Singh had gone to reside with his father-in-law in the village of Malikpur in the Mainpuri district. It would appear that on the 4th of December, 1914, a search had been made at the house of Brikhbhan Singh How far this search was legal we are not in a position to say, but the search was not in connection with anything wrong that Brikhbhan had done. The search must have been in some way connected with Nihal Singh. On the 20th of December, that is to say, 16 days afterwards, Muhammad Naim Khan with two constables, Sundar Singh and Debi Singh, arrived at the house of Brikhbhan Singh, between 10 and 11 a. m. He was met in the village by Hakim Singh, and Nanhai Singh brother of Hakim Singh. Hakim Singh, being the *mukhia* of the village, though he lived in a neighbouring village. According to the Police, when they arrived at the house Nihal Singh at once came out and said:—"you have searched the house shortly before and now you are going to search it again;" and he asked them to fight it out before they searched the house. Immediately a number of other persons arrived; they began to beat the Sub-Inspector and the constables; the Sub-Inspector fired three shots from a revolver in self-defence; the revolver was snatched away and the police were badly beaten. They were put into a cell, shut up, their uniforms and turbans taken from them and they were only released after some persons belonging to a neighbouring village came to their rescue. This is the story told by the police. A number of the accused persons admitted that they had assaulted the police. That the police were

1915

EMPEROR v. BRIKBHBHAN SINGH.

assaulted and beaten there is not the least doubt. But the story of the accused, (at least of those who admit having taken any part in the affair) is that the police arrived whilst all the male members of the house were still at work in the fields, and forced their way into the presence of the women, where they asked for Nihal Singh, that they abused the women, that the women raised an outcry which brought Chotey Singh, a young Thakur aged about 24 years (a son of Brikbhan Singh and brother-in-law of Nihal Singh) to the house, he remonstrated with and abused the police, and that thereupon the Sub-Inspector deliberately fired at him. Chotey Singh admits that he was stooping to pick up a *lathi* when he was fired upon by the Sub-Inspector. The accused then say that they took away the revolver from the Sub-Inspector to prevent his shooting other persons, and that it was necessary to do so. They admit that they used *lathis*, but say that they only did so after Chotey Singh had been shot down.

The first matter that requires some consideration is how far the visit of the police to the house of Brikbhan Singh was legal. It is obvious that the main object of the visit was to search the house. It may even be doubted whether there was ever the least intention of arresting Nihal Singh, except perhaps in the event of suspicious property being found in the house. A search without a warrant from a Magistrate can only be made under the provision of section 165 of the Code of Criminal Procedure. That section provides as follows:—"Whenever an officer in charge of a police station or a police officer making an investigation, considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under section 94 has been or might be issued, will not or would not produce such document or thing according to the directions of the summons or order, or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same, in any place within the limits of the station of which he is in charge, or to which he is attached."

Clause (2).—"Such officer shall, if practicable, conduct the search in person."

1915

EMPEROR v. BRIKHBHAN SINGH.

Clause (3).—"If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer, an order in writing, *specifying the document or thing* for which search is to be made, and the place to be searched, and such subordinate officer may thereupon search for such thing in such place."

We may assume (but only for the purposes of argument) that Mahfuz Ali could have authorized Naim Khan to make the search without a warrant from a Magistrate. But even on this assumption, it was necessary when Mahfuz Ali was not making the search himself that he should have delivered in writing to Naim Khan an order specifying the thing or things which were to be searched for. The section does not authorize a general search on the chance that something may be found. There is no evidence that any such specification was ever given. So far as the evidence goes there was no such specification. We have nothing to show that Naim Khan knew what he was to search for. It seems very much as if the intention was to do the very thing we have said the section does not authorize. It lay on the prosecution to show that the action of the police was legal, and on the evidence we find great difficulty in holding that Naim Khan was duly authorized to search the house of Brikhbhan Singh.

It is contended that while there may have been no legal authority for the search, there was nevertheless authority to arrest Nihal Singh. Arrest without warrant is provided for by section 54 of the Code of Criminal Procedure. The first part of clause 1) is as follows:—"Any Police Officer may without an order from a Magistrate and without a warrant, arrest, first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned."

Mahfuz Ali does not say that Nihal Singh had been concerned in the Nagla Murli dacoity, nor does he say that any complaint had been made that he had been concerned in it, or that any information to that effect had been received or that there was a

1915

EMPEROR v. BHOOPENDRA SINGH.

reasonable suspicion of his having done so. He says in his evidence that the object of the arrest was identification. This presumably means that after his arrest he was to be paraded for the purpose of being identified. It further appears extremely doubtful whether Mahfuz Ali Khan could himself have arrested Nihal Singh. He was a Circle Inspector of the Agra district. It is said that Nam Khan could have arrested Nihal Singh without a warrant under section 54. It is not even pretended that he was acting under the authority of this section. His authority to arrest (if any) was under the document which he had received from Mahfuz Ali. It would seem, therefore, that neither the search of the house, nor the alleged arrest of Nihal Singh was legal. The charge under section 332 of the Indian Penal Code, therefore, fails to the ground.

[The judgement then proceeded to discuss the merits of the case and thus continued:—]

It is contended that, even on the assumption that there was no legal justification for a search or for the arrest, nevertheless the accused were guilty of the other charges, namely, under sections 157, 395 and 342 of the Indian Penal Code, because they had no right of self-defence, having regard to the provisions of sections 99 of the Indian Penal Code. This argument might have some force if we could think that the police had, even after the mistake, honestly come forward and told us exactly what had happened. We have pointed out that there are substantial reasons for thinking that the account given by the accused is more probable than the account given by the police. If we assume it possible that the police had really made their away into the female apartments in the absence of the male members, and that the moment Chotey arrived they shot him down, we could hardly say that the accused could be held guilty for what subsequently occurred, or that the police could claim protection under section 99. There is no doubt that the police were beaten and that *lathis* were used, at the same time none of the injuries were of a very serious nature: no bones were broken. We also fear that there is reason to think that a number of persons who took no part in the occurrence, and who were at worst only on-lookers, were implicated; for example Pokhpal Singh, who is apparently quite blind of one

1915

EMPEROR v. BEHARIAN SINGH.

eye and almost blind of the other. He cannot walk without the support of a stick.

With the exception of Daryai Singh there is not one of the prosecution witnesses we can trust. Hakim Singh we consider quite unworthy of belief. He implicates Gulzari Lal, whom he did not implicate in his first report. According to the police he went away when the row began, and yet he pretends to give evidence as to what occurred right up to the end of the row.

It is alleged that the accused stole the uniforms of the police. This is a matter which is surrounded with mystery. From the very first the principal accused never pretended that they did not know that it was the police who had come to the house. What object the accused would have in stealing the uniforms of the police it is difficult to understand. It is quite clear that they did not want to keep possession of the uniforms; it would have been most dangerous for them to do so. They would not have kept them for the purpose of concealing the marks of blood because the injuries done to the police were perfectly apparent on their bodies. It is just possible that they might have kept the uniforms thinking Chotey had been killed and wishing to retain them as evidence of the identity of the persons who were responsible for his death. Under the circumstances and having regard to the evidence of the record, we feel by no means certain that the police were wearing their uniforms on the day in question. It is, however, impossible for us to be certain one way or the other upon this point.

The judgement of the learned Sessions Judge has been criticised, but we are very far from thinking that he did not arrive at a very fair estimate of the truth of the case. After carefully considering the evidence, we have come to the conclusion that there is no reason for interfering with the judgement of the court below. We accordingly dismiss the appeal. We direct that those of the accused who are in custody shall be released at once and the warrants against those who are said to have absconded are cancelled.

Appeal dismissed.

APPELLATE CIVIL.

1915
July, 27

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

MADHO RAM AND OTHERS (DECREE-HOLDERS) v. NIHAL SINGH AND OTHERS (JUDGEMENT-DEBTORS)*

Civil Procedure Code (1908), *order XXXIV, rule 5—Application for decree absolute for sale on a mortgage—Limitation—To commence a suit—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 181.

An application under order XXXIV, rule 5 (2) of the Code of Civil Procedure (1908), is an application in the suit and not an application in execution, and is governed as regards limitation by article 181 of the first schedule to the Indian Limitation Act, 1908. *Datto Atmaram Thakoba v Shankar Dattatraya* (1), *Madeli Chetti Parvati v. Surati Chandia Mallesfar* (2), *Ali Ahmad v. Nasrat Bibi* (3) and *Gulu Narain v Jagan Nath* (4) referred to.

The right to make such an application accrues on the date when the time limited by the preliminary decree expires, unless such time has been extended by a court of appeal. The principle of the decision in *Gaya Din v. Jhamman Lal* (5) applied.

THIS appeal arose out of an application by the decree-holders for a decree absolute for sale on a mortgage. The preliminary decree for sale upon a mortgage had been passed on the 27th of February, 1909. It allowed a period of six months for payment of the decretal amount. The judgement-debtors appealed from the decree, and the appeal was dismissed and the decree confirmed on the 25th of January, 1911. A second appeal to the High Court was also dismissed on the 25th of January, 1912. No extension of the time fixed by the decree of the court of first instance for payment of the amount of the decree was obtained from either the first appellate court or from the High Court. The decree-holders applied, on the 25th of April, 1913, under order XXXIV, rule 5, of the Code of Civil Procedure for a final decree for sale. The application was disallowed as being barred by limitation. On appeal, the lower appellate court confirmed this decision. The decree-holders appealed to the High Court.

* Second Appeal No. 1838 of 1914, from a decree of A. G. P. Pullan, District Judge of Saharanpur, dated the 30th of August, 1914, confirming a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 24th of July, 1913.

(1) (1913) I. L. R., 38 Bom., 321.
(2) (1911) I. L. R., 33 Calc., 913.
(3) (1902) I. L. R., 24 All., 542.
(4) (1904) I. A. L. J., 15.
(5) (1915) I. L. R., 37 All., 400.

1915

MADHO RAM v. NIHAL SINGH.

Babu *Durga Charan Banerji* (with him Dr. *Surendra Nath Sen*), for the appellants :—

Since the coming into operation of the present Code of Civil Procedure an application for a decree absolute for sale is to be deemed an application in the suit itself and not an application in execution of a decree. Article 182 of the Limitation Act, therefore, does not govern such an application. There being no other article applicable, article 181 applies, which provides a period of three years from the time when the right to apply accrues. The question is when the right to apply accrues. The right, no doubt, accrued for the first time, when the period fixed for payment by the decree of the first court expired; but it is submitted, the right accrued afresh when the decree was confirmed by the first appellate court and again when it was confirmed on second appeal by the High Court. The right to apply did not accrue only once and once for all, but it accrued on each of the three dates. The words in the third column of Article 181 are not "when the right to apply *first* accrues." Obviously, the right to apply for a decree absolute accrues more than once. Where the original decree is reversed on appeal but restored on further appeal the right clearly accrues for the second time from the final appellate decree. The principle is the same whether the first appellate court decrees or dismisses the appeal to it. Again where the appellate court extends the time for payment, the right would accrued for the first time on the expiry of the period fixed by the first court decree accrues again from the subsequent date fixed by the appellate decree. Then again, the judgement-debtors having appealed from the decree, the whole matter became *sub judice*. The final decree would be that of the court of final appeal, although the appellate decree merely confirmed that of the first court; *Abdul Majid* v. *Jawahar Lal* (1). The first court decree becomes merged in that of the appellate court, and it is the latter decree which would be followed by the decree absolute. There could be no decree absolute until the preliminary decree had become final, and as long as the matter was *sub judice* the preliminary decree could not become final. There

(1) (1910) I. L. R. 33 All., 164, (168,169).

1915

MADHO R.M v. NIHAL SINGH

was an accrual of the right to apply for a decree absolute when the appellate decree was passed, and the application having been made within three years of the appellate decree, it was not barred by limitation.

Mr. Nihal Chand (with whom *Mr. W. Wallach*), for the respondents :—

It is not disputed that article 181 of the Limitation Act is the article applicable to the case. As to the question of the time when the right to apply accrued, the test is, when could the decree-holders have presented an application for a decree absolute. Undoubtedly they could have done so when the period fixed by the decree of the first court expired. The right to apply accrued on the expiry of that period ; *Ali Ahmad* v. *Nasiran Bibi* (1), *Udit Narain* v. *Jagan Nath* (2). The right having once accrued, the mere fact that the judgement-debtors had preferred an appeal did not put a stop to that right or keep it in abeyance. There was nothing to prevent the decree-holders from proceeding with an application for a decree absolute. The Legislature nowhere lays down that the holder of a preliminary decree for sale must wait for the termination of all proceedings in appeal before applying for a final decree; *Muhammad Sadiq* v. *Ghous Muhammad* (3). There was no impediment in the present case preventing the decree-holders from proceeding with their application as there was in the case of *Ruddar Singh* v. *Dhanpat Singh* (4). There the decree-holders were estopped by an injunction, and it was held that time began to run against the decree-holders as soon as the bar of injunction was removed ; fresh time was not allowed from the date of the confirmation by the High Court of the decree of the lower appellate court. The right *is not* a recurrent right. The appellants are trying to read into article 181 of the Limitation Act the provisions of article 182 regarding appellate decrees. Even if the right in question be deemed capable of accruing more than once the meaning to be put upon the provisions of article 181 is that time begins to run from the date when the right first accrues. The case of instalment bonds is analogous and I rely on the principle of the

(1) (1902) I. L. R., 24 All., 542.
(2) (1904) 1 A. L. J., 13.
(3) (1913) 11 A. L. J., 975.
(4) (1903) I. L. R., 26 All., 156.

1915

MADHO RAM v. NIHAL SINGH.

decision in *Gaya Din* v. *Jhumman Lal* (1). The decree-holders' right to apply for a decree absolute having accrued on the expiration of the six months fixed by the preliminary decree, and that decree having never been reversed or modified in any way by either of the appellate courts, and there never having been any impediment against the decree-holders' prosecuting their application if they chose to do so, the time ran against them continuously for more than three years and their right is extinguished. The ruling in I. L. R., 33 All., 154, cited by the appellants has no application, as it relates to a case of execution of decree.

Babu *Durga Charan Banerji*, in reply:—

With the exception of the case in 1 A. L. J., 15, the cases cited by the respondents are not in point. None of them dealt with the question in issue in the present case, namely, where the appellate decree confirms the first court decree and does not extend the time fixed for payment whether the decree-holder can apply within three years of the appellate decree. In the case in 1 A. L. J., 15, there was no appeal as regards the 2/3 share in respect of which the order absolute was sought to be obtained. The appellants' contention rests on one or other of two views: either the decree of the appellate court revives the right to apply for a decree absolute or the decree of the first court is merged in the appellate decree and the right accrues after six months from the appellate decree.

BANERJI and MUHAMMAD RAFIQ, JJ.:—This appeal arises out of an application made under order XXXIV, rule 5, of the Code of Civil Procedure for a final decree in a suit for sale upon a mortgage. The preliminary decree under order XXXIV, rule 4, was made on the 27th of February, 1909. That decree allowed a period of six months to the judgment-debtor to pay the amount of the decree, and that period expired on the 26th of August, 1909. Meanwhile the judgment-debtor appealed, with the result that the decree of the court of first instance was affirmed by the lower appellate court on the 25th of January, 1911, and on second appeal by the High Court on the 25th of January, 1912. Neither the first appellate court nor this Court extended the time for

(1) (1916) I. L. R., 37 All., 403.

1915

MADHO RAM v. NIHAL SINGH.

payment of the mortgage money. The present application was made on the 25th of April, 1913. It was contended on behalf of the judgement-debtors, that is, the mortgagors, that the application was beyond time. This contention was allowed by the court of first instance and the decision of that court was affirmed by the lower appellate court. The decree-holders have preferred this appeal, and it is urged on their behalf that limitation should be computed either from the date on which the decree of the court of first instance was affirmed by the lower appellate court or when the decree of this Court was made. In order to consider whether the application is barred by limitation or not, it is first of all necessary to determine what article of the first schedule of the Limitation Act is applicable to the present case. It is clear that article 182 does not apply, and, there being no other article which is applicable, the only article which can be applied is article 181. Rule 5 of order XXXIV provides that where payment is not made within the time fixed, the court shall on application made in that behalf by the plaintiff pass the final decree for the sale of the mortgaged property or a sufficient part thereof. Therefore it is necessary that an application should be made by the plaintiff in order to obtain a final decree under that order. The application is thus an application in the suit and since the passing of the present Code of Civil Procedure it can no longer be said to be an application in execution or for the execution of a decree. It is therefore manifest that article 182 cannot apply, and, as stated above, since there is no other article which is applicable, the only article which would govern an application of this kind, would be article 181. This has been held by the Bombay High Court in *Datto Atmaram Husabnis* v. *Shankar Dattatraya* (1), following the decision of JENKINS, C.J., in *Anilook Chand Parrack* v. *Surat Chunder Mukerjee* (2). Under the old Limitation Act also it was held by this Court in *Ali Ahmad* v. *Naziran Bibi*(3) and *Udit Narain* v. *Jagan Nath* (4) that an application for an order absolute for sale under the Transfer of Property Act was governed by article 178 of the Limitation Act of 1877, which corresponds to article 181 of the present Act.

(1) (1913) I. L. R., 38 Bom., 32. (3) (1902) I. L. R., 24 All., 142.

(2) (1911) I. L. R., 38 Calc., 913. (4) (1904) I. A. L. J., 25

4

1915

MADHO RAM v. NIHAL SINGH

The next question to be considered is when did the right to apply accrue, as provided in the 3rd column of that article. There can be no doubt that after the expiry of the six months, allowed by the decree of the court of first instance, the decree-holders plaintiffs became entitled to apply for a final decree. The mere fact that an appeal was preferred from the preliminary decree did not take away that right or postpone it. This is conceded by the learned vakil for the appellants, but he urges that he also acquired the right to apply when the decrees of the appellate courts, namely, that of the first court of appeal and of the High Court, were passed. It seems to us that limitation should be computed from the time when the right to apply first accrued. That right accrued, as we have said above, when the six months granted by the court of first instance to the judg-ment-debtors expired. The passing of the subsequent decrees by the appellate courts only affirmed that right and did not give rise to a fresh right, unless the decree of the court of first instance was in any respect varied by the appellate courts. We think that the analogy of the decision of the majority of the Full Bench in *Daya Din* v. *Jhamman Lal* (1) applies. That was a case in which the question was whether the money sought to be recovered became due under article 132 of the first schedule when default was first made in the payment of instalments. It was held that the money became due when the first default was made. On the same principle limitation must be computed in a case like the present, from the time when the plaintiff's right to make an application for a final decree first accrued. Admittedly the right first accrued in this case on the 26th of August, 1909, and, more than three years having expired from that date when the present application was made, it is beyond time. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1915) I. L. R., 37 All., 409

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD MAHBUB ALI KHAN (PLAINTIFF) v. RAGHUBAR DAYAL AND OTHERS (DEFENDANTS).*

1915 July, 29

Pre-emption—Wajib-ul-arz—Custom—Effect of perfect partition.

The wajib-ul-arz of an undivided village supported a finding that there existed a custom of pre-emption amongst the co-sharers in the village. Subsequently to the framing of this wajib-ul-arz a perfect partition of the village took place.

Held that the onus of such a custom was the contrary relation, and that after partition a co-sharer in one mahal could not claim pre-emption in respect of property sold in another mahal in which the pre-emptor was not a co-sharer. *Daljangan Singh v. Kalka Singh* (1) and *Ganga Singh v. Chhabi Lal* (2) referred to.

THIS was a suit for pre-emption based upon custom, in support of which reliance was placed on a wajib-ul-arz of the village in which the property sold was situate of the year 1865. At that time the village consisted of a single mahal, but since then had been the subject of a perfect partition. The land sold was in a different mahal from that in which the pre-emptor was a co-sharer. The court of first instance dismissed the suit, holding that, although the wajib-ul-arz of 1865 was evidence of a custom then in existence, it did not apply to the altered circumstances of the village at the date of the suit so as to afford the plaintiff a basis for his claim. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Ibn Ahmad*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.:—This appeal arises out of a suit for pre-emption. The court below has dismissed the claim. The plaintiff adduced, as evidence of the existence of the custom, an extract from the wajib-ul-arz of 1865. The court below has considered the history of the village. It has also considered the the terms of wajib-ul-arz. The language used in the wajib-ul-arz coupled with the history of the village strongly suggests that what was recorded in the wajib-ul-arz of 1865 was not an existing custom but an arrangement between the co-sharers. We are not prepared to dissent from the view taken by the court below that a custom of pre-emption has not been proved in the present case.

* First Appeal No. 435 of 1913, from a decree of Khirod Gopal Banerji, Officiating Subordinate Judge of Budaun, dated the 2nd of September, 1913.

(1) (1909) I. L. R., 32 All., 1. (2) (1913) I. L. R., 35 All., 605.

1915

MUHAMMAD MAHBUB ALI KHAN v. RAGHUBAR DAYAL.

There is, however, another matter which we think is fatal to the plaintiff's claim. Since the wajib-ul-arz of 1865 perfect partition has taken place in the village and the plaintiff was not at the time of the sale a co-sharer *with the vendor*. His property was situate in a separate mahal. There was no joint and several responsibility between the plaintiff and the vendors for the payment of the Government revenue assessed upon their respective properties. Neither had any voice in the management or share in the enjoyment of the other's zamindari. It lay upon the plaintiff in the present case not merely to prove the existence of *some* custom of pre-emption, he had to prove the existence of a custom under which he himself had a right, that is to say, he had to prove the existence of a custom which gave a right to a person who was not a co-sharer with the vendor. The great importance in pre-emption cases of the co-parcenary relationship has been pointed out in the case of *Dalganjan Singh* v. *Kalika Singh* (1), and also in the case of *Ganga Singh* v. *Ghasi Lal* (2). The only evidence of the existence of a custom in the present case was the extract from the wajib-ul-arz to which we have referred. But that record clearly relates *to a right between co-sharers*, because at that date partition had not taken place and all the proprietors in the village were co-sharers with each other. We are now deciding that the custom (assuming that there was one) ceased on the result of partition. The custom continues, but the plaintiff not being a co-sharer with the vendor is no longer within the custom. We think that the plaintiff gave no evidence of the existence of a custom which gave a person who was not a co-sharer with the vendor a right of pre-emption. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1869) I. L. R., 23 All., 1 (2) (1911) I. L. R., 33 All., 605

APPELLATE CRIMINAL.

1915
August, 3

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

EMPEROR v. RUSTAM.*

Criminal Procedure Code, section 512—Evidence taken against an accused person who has absconded—Condition precedent to use of such evidence against accused when arrested.

Evidence purporting to have been recorded under the provisions of section 512 of the Code of Criminal Procedure cannot be used against the person concerning whom it was taken, unless it can be shown that before such evidence was recorded it was proved to the satisfaction of the court that the accused had absconded and that there was no immediate prospect of arresting him.

THIS was an appeal against an order of the Sessions Judge of Farrukhabad convicting one Rustam under section 307 of the Indian Penal Code and sentencing him to transportation for life. The facts upon which the charge (originally one under section 302 of the Code was based) occurred so long ago, as 1897, and most of the evidence against the accused consisted of evidence purporting to have been recorded under section 512 of the Code of Criminal Procedure in 1897, 1898 and 1911. In appeal the main contention was that this evidence was inadmissible. The facts of the case are set forth in detail in the judgement of Court.

Mr. C. Ross Alston, for the appellant.

The Assistant Government Advocate (*Mr. R. Malcomson*), for the Crown.

MUHAMMAD RAFIQ, J.—The appellant in this case is one Rustam, who was committed to the Court of Session on the charge of murder under section 302 of the Indian Penal Code. During his trial the learned Sessions Judge added a further charge under section 307, that is, an attempt to murder, and convicting him under that section sentenced him to transportation for life. The murder was committed as long ago as the 3rd of December, 1897. The case for the prosecution is that on the night of the 3rd of December, 1897, the appellant was driving a camel-cart from Farrukhabad. On his arrival at Nandsa he had to change the camel, and asked Sad-ullah, who was in charge of the camel that was relieved, to

* Criminal Appeal No. 543 of 1915, from an order of A. Sabonadiere, Sessions Judge of Farrukhabad, dated the 21st of June, 1915.

1915

EMPEROR v. RUSTAM

help him in the harnessing of the other camel and also to accompany him to the next stage. Sad-ullah refused to go with the appellant any further, upon which the appellant took up an axe and attacked him with it, and inflicted blows on the head which resulted in almost instantaneous death. Rustam, the appellant, then ran away and was not heard of till he was arrested this year, and put on his trial. Soon after the murder the zamindar of the place reported the occurrence and a Sub-Inspector proceeded to the spot at once. The case was sent up to the court on the 24th of December, 1897, and on the same date evidence purporting to be taken under section 512, was recorded. Subsequently it was discovered that the proceedings which were taken in 1897 were incomplete and an order was issued to the police to furnish proper evidence. This was in 1898. A proclamation under section 87 was issued, as also a warrant for the arrest of Rustam, both of which were sent to the district of Mainpuri, of which district he was a resident. One Ata-ullah, a constable of the Mainpuri district, was examined on the 16th of August, 1898, who deposed to having made a search for the appellant and to having failed to find him. On the 3rd of September, 1898, the witnesses who were examined in 1897, were re-examined. Some time in April, 1914, the prosecuting Inspector of Farrukhabad, presumably on going through the old files, came upon the file of this case. He reported that the evidence which purported to have been taken under section 512 of the Code of Criminal Procedure was not legally correct and recommended that fresh proceedings should be taken. In accordance with his suggestion, the case was again taken up by a magistrate of the district and formal evidence of the appellant having absconded was recorded and the only surviving witness Musammat Vilayatan was examined. These facts we have discovered by going carefully through the files of 1897, 1898 and 1914, which are in the record of this case. The only evidence against the appellant on his trial in the present case, consists of the deposition of Musammat Vilayatan, who is alive, and was examined before the learned Sessions Judge, and the depositions of four other witnesses who were examined in 1897, namely, Imtiazan, Husaini, Mohan and Ram Singh. The learned Sessions Judge, by a formal order, dated the 21st of June, 1915, brought the statements of the said four witnesses

1915

EMPEROR
v.
KESHUA.

on the record as evidence on behalf of the prosecution. We also find the evidence of the said four witnesses recorded in 1898 on the file of the Sessions Court, though no order appears on the file showing how and when and under what circumstances those statements were brought on the record. The evidence of Musammat Vijayatta, as recorded by the learned Sessions Judge at the present trial, was rejected by him. The conviction of the appellant rests on the statements of the other witnesses recorded in 1897. The learned counsel for the appellant contends that the said evidence is inadmissible inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In section 512, it is distinctly laid down that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the court which records the proceedings under it, must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897, in fact, no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand. But it is suggested on behalf of the Crown that the case should be sent back for re-trial with a direction to the learned Sessions Judge to admit the evidence taken in 1898, inasmuch as that evidence was taken after proof had been received of the absconding of the accused. We find that the only statement in 1898 with regard to the absconding of the accused is that of one Ata-ullah, a constable of the Mainpuri district. He does not say that there is no immediate prospect of the arrest of the accused, nor is there any finding by the Magistrate that he is satisfied that the accused is absconding and that there is no immediate prospect of his arrest. Moreover, we have considered the evidence of the other witnesses who were

1915

EMPEROR v. RUSTAM.

examined in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellants. Of the witnesses examined in 1898, Muammar Vilayat-un cannot be relied upon. Mohan Chamar and Muhammad Yusuf distinctly say that they did not see Rustam the appellant, strike the deceased. The other witnesses Imtiazan, Ram Singh and Husaini do swear that they recognized Rustam as the assailant of the deceased. It should be observed here that none of the witnesses was present normally on the spot when the assault on Sadullah is said to have taken place. All the witnesses say that they ran upon hearing the cries of Sadullah. Imtiazan and Husaini also came up. It was a dark night, and, according to Muhammad Yusuf, it was not possible to recognize any person at any distance. There is therefore room for doubt as to the evidence of Imtiazan, Husaini and Ram Singh. In our opinion it would serve no useful purpose to send back the case for re-trial, with the direction to admit the evidence taken in 1898. We therefore accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

BANERJI, J.—I concur.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

1915

August, 9.

EMPEROR v. BHOLE SINGH *

Criminal Procedure Code, sections 4 and 176—"Complaint"—Statement made to magistrate on his examining certain Act No. XLV of 1860 (the Indian Penal Code), section 211.

Held that it was not competent to a Magistrate to treat such a statement, and found thereon such procedure as would naturally follow on a complaint, including a prosecution under section 211 of the Indian Penal Code, a statement which was made to him extra-judicially and without any intention or desire that it should be taken as a complaint, but merely in reply to a question asked by the Magistrate.

THE facts of this case are, shortly, as follows:—

One Paras Ram, who was a village headman, appeared before the District Magistrate of Jhansi and put in a petition stating

* Criminal Revision No. 498 of 1915, from an order of F. A. Phelps, District Magistrate of Jhansi, dated the 6th of April, 1915.

1916

EMPEROR
v.
PARAS
RAM.

that he wished to resign his post. The District Magistrate asked him the reason for his wishing to resign and he then made a statement charging the police Inspector with extortion and tyranny in connection with a dacoity. The Magistrate summoned certain persons who were mentioned by the headman as having been compelled to pay money to the Sub-Inspector, examined them and Paras Ram on oath and came to the conclusion that a *prima facie* case had been made against the police. He, however, sent the case to the Superintendent of Police to make an inquiry under paragraph 388 of the Police Regulations. The Superintendent made a report that the charges were groundless. The District Magistrate thereupon ordered the prosecution of Paras Ram and of his witnesses under section 211 of the Indian Penal Code, for giving false evidence. The witnesses applied to the High Court in revision. The Magistrate submitted an explanation saying that he had treated the examination on oath as a complaint.

Babu *Piari Lal Banerji*, for the applicant :—

The application was made to the Magistrate in his executive capacity and the inquiry that followed was only a departmental one. He could not examine the witnesses, as he did, because he was not sitting as a court. The utmost he could do was that he could file a complaint. Though the order was executive, this Court has still power to interfere because the order purported to have been passed under section 476 of the Code of Criminal Procedure. The words "committed before it" in that section meant committed while he was sitting in his judicial capacity. The offence was not brought to his notice judicially. The Code gave a right to the Magistrate to order an inquiry without a complaint having been filed, but the inquiry was not a judicial one. See Part V, Chapter XIV. Paras Ram never made a complaint. He tendered his resignation, and on questions being put to him by the Magistrate he gave out the story. When a complaint is filed the usual procedure is to examine the complainant and issue process against the accused person and not to direct a police inquiry. The fact that the Magistrate only directed a police inquiry showed that he did not treat it as a complaint. Paras Ram did not ask the Magistrate to take action against the Police. The statement was not therefore a complaint. But, if it be taken to be a complaint,

1915

EMPEROR v. BHOLE SINGH.

it was still pending and no prosecution could be ordered until it was finally disposed of. The Magistrate could not keep the complaint pending and order prosecution for making a false complaint. *Sangilia Pillai* v. *The District Magistrate of Trichinopoly* (1).

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

The Magistrate either acted in his executive capacity or judicially and in either case the order is right. If the order was an executive order the High Court could not interfere. The Magistrate stated that he treated the statement as a complaint. The charge, however, related to the Police, and under paragraph 388, Police Regulations, the Magistrate sent it on to the Superintendent. The Magistrate treating it as a complaint could examine anybody he pleased, and acting under section 190 he examined witnesses without protest by the accused. The complaint was found to be false and sanction had been rightly given.

Piari Lal Banerji, in reply cited *Queen-Empress* v. *Deokinandan* (2) and *Empress* v. *Phulel* (3).

TUDBALL, J.:—The present application has arisen from the following facts:—One Paras Ram, a village headman, on the 17th of February last, filed before the District Magistrate a petition in which he stated that he wished to resign his post as village headman as he was too old and unable to do his work. The District Magistrate apparently doubted the correctness of the reason given and questioned the man. In reply to questions put to him the man stated that the police of a certain police station were investigating a dacoity case and in the course of their investigation they were forcing a large number of people to pay money to them; that he was afraid of getting into trouble through this matter and he therefore wished to resign. The District Magistrate in his explanation states that he treated this as a complaint and he thereupon put Paras Ram on oath and examined him again. What he stated was then reduced to writing. On completion of his statement the Magistrate gave a rubkar to a chaprasi of his court, which contained the names of twelve persons, and in this he

(1) (1901) I.L.R., 25 Mad., 659, 661. (2) (1887) I.L.R., 10 All., 89.
(3) (1912) I.L.R., 35 All., 103.

directed the aforesaid chaprasi to produce the persons named therein before him at once. Apparently the chaprasi obeyed orders and produced all these persons. These persons are those whose names were mentioned by Paras Ram in the course of his statement as being connected in some way or other with the alleged extortion. The District Magistrate then recorded the evidence of all these persons on oath. Having proceeded so far he then sent the papers to the Superintendent of Police with directions to him to take action under paragraph 388 of the Police Regulations. This paragraph lays down that before a Superintendent punishes any police officer departmentally or prosecutes him criminally, he must make an inquiry, reduce the substance of the accusation to the form of a charge and record the officer's explanation, using a certain form. After completing these proceedings, if he considers that further steps should be taken, he should decide whether the officer ought to be criminally prosecuted or departmentally punished. If he decides to institute a prosecution, he must send the papers to the District Magistrate, and obtain his concurrence before taking further action, whatever the rank of the officer accused may be. The Superintendent of Police made an inquiry and submitted a report to the District Magistrate to the effect that the allegations of extortion were entirely false and suggested that the person who had made them and reported them, should be criminally prosecuted. Thereupon the District Magistrate passed an order purporting to be one under section 476, directing the prosecution of the present applicants and certain others including Paras Ram, the latter to be prosecuted for an offence under section 211; the others to be prosecuted for offences under section 193 of the Indian Penal Code. It is against this action of the District Magistrate that the present revision has been presented. It is contended, and I must say with considerable force, that Paras Ram made no complaint; that he did not intend to make any complaint; that he called no witnesses and the proceeding before the District Magistrate was not a judicial proceeding in the course of which he was legally empowered to administer an oath. The explanation of the District Magistrate is that he treated what Paras Ram said as a complaint and that the inquiry that he made was under section 202 of the Code of Criminal Procedure. The only

1915

EMPEROR v. BHOLE SINGH.

1913

EMPEROR v. BIRBAL SINGH.

unfortunate point in this explanation is that a complaint means an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence. It is not open to the District Magistrate to treat this petition and statement of Paras Ram as a complaint whether Paras Ram liked it or not. It may be of course that Paras Ram wished to make a complaint in such a form that, if subsequently it was found to be false, he should be able to save himself from a criminal prosecution. If there was evidence in the case to indicate that Paras Ram intended the Magistrate to take action under the Code against the police officers, I should not hesitate for an instant in holding that the Magistrate had power to treat the petition as a complaint and that he was justified in sending for the witnesses and examining them on oath. But an examination of the record shows that Paras Ram's petition was simply a petition tendering his resignation; that even in his statements taken on oath, which statements was made in reply to questions put by the District Magistrate, he made allegations of fact and at the end stated that these were his reasons for resigning his post. He nowhere asked for the witnesses to be summoned. He nowhere asked for an inquiry to be made, and I may add that if the Magistrate was knowingly acting under section 202, it is curious that on completion of his inquiry he should send the complaint to the Superintendent of Police with a view to the latter officer taking action under paragraph 382 of the Police Regulations. It is also curious, that up to the present time the District Magistrate has passed no order dismissing the complaint. Looking at the circumstances of the case I find it impossible to hold that Paras Ram made a complaint to the District Magistrate, that is to say, that the allegation was made with a view to the Magistrate taking action under the Code of Criminal Procedure against the police officers who were said to have committed the extortion. Paras Ram may perhaps have given false information to the District Magistrate in reply to his questions. The point which I have to decide is whether or not there was a complaint, within the true meaning of the word, before the District Magistrate. In my opinion there was no such complaint. The action of the Magistrate was not action taken under section 202 of the Code. It was apparently

executive action in the form of a departmental inquiry which was continued by the further inquiry made under paragraph 288 of the Police Regulations. There was no judicial proceeding before the District Magistrate and therefore he had no power to take action under section 476. The present applicant is one of those whose prosecution for perjury has been directed, and it cannot be said that he committed perjury in course of a departmental inquiry. No oath ought to have been administered to him at all. I would point out that throughout the inquiry made by the District Magistrate, he nowhere mentioned that he was taking action under any specific section. If, as the District Magistrate says, the unfortunate police officers will not have an opportunity of clearing their character, they will have only the District Magistrate to blame for their unfortunate position; though perhaps it is still open to the District Magistrate to prosecute Paras Ram for giving false information. I allow the application, set aside the order of the District Magistrate and quash the proceedings.

Order set aside.

1915

EMPEROR v. PARAS SINGH

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915

August, 4

DESRAJ (OBJECTOR) v. SAGAR MAL (JUDGMENT-DEBTOR AND DAS) GIRRAJ SINGH AND OTHERS (DECREE-HOLDERS).*

Act No. III of 1907 (Provincial Insolvency Act), section 37—Insolvency—Effect of sale of property while attached shortly before filing petition of insolvency.

Section 37 of the Provincial Insolvency Act, 1907, has no application to the case of a bona fide and for good consideration by an insolvent shortly before the filing of his petition, unless the object thereof is to give a preference to one creditor over the others. If the transaction is found to be a merely colourable transaction, the insolvent still remains possessed of the property leased, it can be avoided and the property placed in the hands of the receiver; otherwise the rents should be paid to the receiver for the benefit of the creditors. The leased property being an ordinary holding, held that there was no reason for directing the surrender thereof to the zamindar.

THE facts of this case were as follows:—

One Sagar Mal was adjudicated an insolvent upon his own petition on the 1st of August, 1914. His petition of insolvency

* First Appeal No. 110 of 1915, from an order of L. Sanderson, District Judge of Meerut, dated the 7th of May, 1915.

1915

DESRAJ v. SAGAR MAL.

was presented on the 3rd of May previously. A receiver was duly appointed, who attached certain crops growing on an occupancy holding which belonged to the insolvent. Desraj objected and said that the crops were his, Sagar Mal having executed a lease in his favour on the 16th of April, 1914. He lodged security with the receiver and had the crops released. He then made an application to have his money returned to him. Rao Girraj Singh, one of the creditors who had obtained a decree against Sagar Mal, challenged the validity of the lease, alleging that the lease was fictitious and that the value of the occupancy holding was far beyond the rent mentioned in the lease, which was the sum of Rs. 260 per annum. He further alleged that the insolvent was in actual possession and cultivated the land. The learned District Judge in a short judgement states as follows:—"Under section 37, Act III of 1907, this lease shall be deemed fraudulent and void, and I now annul it. Desraj then has no *locus standi*. He has got the crops and his deposit of Rs. 330 is forfeited. I dismiss this objection with costs." Later on the learned Judge says—"The receiver will arrange to surrender the insolvent's occupancy rights and to vacate the holding. He should enter into negotiations with Rao Girraj Singh for this purpose. The government demand must be secured and my official expenses."

The lessee appealed to the High Court.

Pandit *Mohan Lal Sandal* and Babu *Girdhari Lal Agarwala*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C.J., and BANERJI, J.:—This appeal arises out of an insolvency matter. One Sagar Mal was adjudicated an insolvent upon his own petition on the 1st of August, 1914. His petition of insolvency was presented on the 3rd of May previously. A receiver was duly appointed, who attached certain crops growing on an occupancy holding which belonged to the insolvent. Desraj objected and said that the crops were his, Sagar Mal having executed a lease in his favour on the 16th of April, 1914. He lodged security with the receiver and had the crops released. He then made an application to have his money returned to him. Rao Girraj Singh, one of the creditors who had obtained a decree against Sagar Mal, challenged the validity of the lease, alleging

1915

DESRAJ v. SAGAR MAL.

that the lease was fictitious and that the value of the occupancy holding was far beyond the rent mentioned in the lease, which was the sum of Rs. 260 per annum. He further alleged that the insolvent was in actual possession and cultivated the land. The learned District Judge in a short judgement states as follows:—"Under section 37, Act III of 1907, this lease shall be deemed fraudulent and void, and I now annul it. Desraj then has no *locus standi*. He has got the crops and his deposit of Rs. 330 is forfeited. I dismiss this objection with costs." Later on the learned Judge says—"The receiver will arrange to surrender the insolvent's occupancy rights and to vacate the holding. He should enter into negotiations with Rao Girraj Singh for this purpose. The government demand must be secured and my official expenses." It seems to us that the order of the District Judge was altogether wrong. In the first place section 37 had no application whatsoever. This section deals entirely with transfers, payments *et cetera* made in favour of one creditor by an insolvent with a view of giving that particular creditor a preference over the other creditors (see marginal note to the section). If the insolvent in the present case had in truth made a lease in favour of Desraj at a reasonable rent, the transaction would have been a perfectly valid one. The receiver would step into the shoes of the insolvent and become entitled to the rent reserved by the lease which he would hold for the benefit of the creditors. Of course, on the other hand, if the court came to the conclusion that the lease was a mere blind, that it never was intended that any person except the insolvent should cultivate the land, then the crop which was attached still belonged to the estate of the insolvent and the receiver was entitled to them. It seems to us also that the learned District Judge made a great mistake when he directed the receiver to surrender the occupancy holding. According to the objection taken by Rao Girraj Singh, the occupancy holding was a very valuable holding. He goes so far as to say that it would let for Rs. 450 a year. It is very difficult to see how the creditors of the insolvent would profit by the surrender of this very valuable holding. It is the duty of the receiver and the court when administering the estate of an insolvent to preserve such estate as far as possible for the benefit of the creditors. The last thing

1915

DEBIA v. SAGAR MAL.

desirable would be to give up any property that was of value. We allow the appeal, set aside the order of the District Judge and remand the case to him with directions to re-admit it under its original number in the file and to proceed to hear and determine the same according to law having regard to what we have said above. Costs of both sides will be costs in the matter.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

Before Sir Henry Richards, Knight, Chief Justice.

1915

September, 9.

EMPEROR v. RAM DAYAL AND OTHERS*

Act (Local) N) II of 1901 (Agra Tenancy Act), section 121—Distress—Arrangement—Decree by Assets of Revenue cops—Theft—Act No XLV of 1860 (Indian Penal Code), section 379.

A distress legally carried out according to the provisions of the Agra Tenancy Act, 1901, takes priority over the rights of a decree-holder who has attached the crops distrained, and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants.

When, therefore, certain cultivators acting under section 121 (1) of the Agra Tenancy Act, cut and stored certain crops which had been distrained by their landlord, but which had also been previously attached by a decree-holder, it was *held* that they had committed no offence.

THE facts of this case were as follows :—

One Harnam Singh had a decree for rent against Ram Dayal, Bhawani and Bhagirathi. He put this decree into execution and attached certain crops belonging to the judgement-debtors, and one Asa was appointed as *shahna* or custodian. This was on the 15th of March, 1915. On the 23rd of March, 1915, Sundar Singh, the landlord of the fields in question, distrained these very crops and appointed one Rattu as his *shahna*. The distress was carried through regularly according to the provisions of the Agra Tenancy Act. Thereafter the tenants cut and stored the crops in question for the benefit of the distrainer, and in respect of this action they were charged with and convicted by a Magistrate of the offence of theft. From this conviction they applied in revision to the Sessions Judge, who, being of opinion that the action of the tenants was justified, referred the case to the High Court recommending their acquittal.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

*Criminal Reference No. 597 of 1915.

1915

EMPEROR v. RAM DAYAL.

The opposite parties were not represented.

RICHARDS, C.J. :—It appears that a decree was obtained against certain cultivators. The *farinda* of the landlord purported to distrain the crops which had been attached in execution of the decree. The cultivators then cut and carried away the crops. They were charged under section 379 with having committed theft and sentenced to one month's rigorous imprisonment each. The learned Sessions Judge, on the matter coming up before him in revision, thought that the fact that the landlord had distrained the crops made the subsequent cutting and taking away of the crops by the accused lawful. He considered that this would be so notwithstanding that the distraint might have been more or less collusive between the landlord and his tenants. He therefore thought that the accused were wrongly convicted. The learned Magistrate has explained that in his opinion distraint having been made by an agent who was not authorized in writing was illegal, and that therefore the illegal distraint could not justify the removal of the crop. The learned Sessions Judge points out that the distress was held to be lawful by the Revenue Court. In my opinion it is unnecessary to decide whether or not the distress was lawful. A landlord who has rent due to him is entitled to distrain, notwithstanding that the result of the distraint may be in whole or in part to defeat the execution of a decree. Before the accused could be found to be guilty of the offence of theft it must be found that they dishonestly took the property out of the possession of another person. If the present accused believed that a legal distraint had been made by their landlord and in such belief cut and removed the crop I do not think that they could be said to have "dishonestly" taken the property out of the possession of any other person. The accused of course are entitled to the benefit of any reasonable doubt and I think it may very well have been that the accused in the present case honestly believed that the distraint had been made by their landlord. I set aside the convictions and sentences passed upon the accused. If they are in prison they will be released. If they are on bail they and their sureties will be released.

Conviction set aside.

APPELLATE CRIMINAL.

1915 September, 30.

Before Sir Henry Richards, Knight, Chief Justice

EMPEROR v. KALKA PRASAD *

Criminal Procedure Code, sections 222 (2), and 233—Act No. XLV of 1860 (Indian Penal Code), sections 409 and 477A—Mis-joinder of charges—Criminal breach of trust and falsification of accounts—Illegality.

An accused person was charged with and tried at the same trial for offences under section 409 and section 477A of the Indian Penal Code.

In respect of the former offence he was charged with criminal breach of trust respecting a large sum of money composed of numerous items. In respect of the latter offence he was charged with suppressing a large number of documents showing the realization of sums of money by the persons liable to pay the same, and with putting false numbers on three of such documents. These documents (called *arrisals*) related as well to other sums of money as to the sums which the accused was alleged to have embezzled.

Held that the principle of section 222(2) of the Code of Criminal Procedure could not apply to section 477A of the Indian Penal Code, and that the framing of the charges against the accused in the manner described was an illegality which vitiated the trial.

THE facts of this case were as follows:—

Kalka Prasad the accused was *tahvildar* at the Sub-Treasury of Futehpur. He used to receive various sums of money that used to be paid in daily by various persons who had to pay money to Government. The money was paid in by means of *arrisals* filled up by the applicants showing the amount of money tendered. These *arrisals* were on printed forms in duplicate and the duty of the accused was to enter the particulars of *arrisal* in a daily register, to put on the *arrisal* the same serial number as the entry in his register relating to it bore, then to receive the money and sign the *arrisal*, keep one part and return the duplicate to the applicant. The prosecution case was that on the 4th, 5th and 6th of May large sums of money were paid in by several persons by means of 120 *arrisals*, Exhibits 1 to 120, aggregating Rs. 7,430-3-4, out of which the accused only accounted for Rs. 1,543-3-5, leaving a deficit of Rs. 5,887-15-11. Out of this it *Rule*, the prosecution selected the amounts covered by 43 *arrisals* amounting to Rs. 3,991-6-11 and charged the accused with criminal breach of trust with respect to this amount. The accused

* Criminal Appeal No. 635 of 1915, from an order of Ram Chandra Chaubey, Sessions Judge of Banda, dated the 22nd of July, 1915.

1915

EMPEROR v. KALKA PRASAD.

was further charged with falsification of account books inasmuch as he omitted to enter any of the *arzisals* Exhibits 1 to 120 in his daily register and entered fictitious numbers on the duplicates of 3 *arzisals* Ex. 17, 18 and 19. The accused was committed to take his trial before the court of Session. The charge sheet so far as material was as follows :—

"(*a*) That you between the dates 4th to 6th May received on behalf of your employer Rs. 3,991-6-11 and committed criminal breach of trust with respect to it punishable under section 409, Indian Penal Code.

"(*b*) That you being entrusted on behalf of your employer with a Siaha Bahi fraudulently omitted to enter thereon *arzisals* Exhibits 1 to 120, and put on Exhibits 17, 18 and 19 false numbers, and committed an offence under section 477A, Indian Penal Code."

The accused was convicted under charge (*a*) and sentenced to seven years' rigorous imprisonment and convicted under charge (*b*) and sentenced to three years' rigorous imprisonment the sentences to run concurrently. He was also fined Rs. 4,000. From this conviction and sentence Kalka Prasad appealed to the High Court.

Babu *Piari Lal Banerji* (with Pandit *Krishna Narayan Laghate*), for the appellant :—

The trial was vitiated by the misjoinder of charges and according to the decision of the Privy Council the contravention of the provision of section 233 of the Code of Criminal Procedure vitiated the whole trial and the question of prejudice to the accused did not arise; *Subrahmania Ayyar* v. *King-Emperor* (1). There were two defects in the charge. Firstly, charge (*b*) contravened the provisions of section 234 inasmuch as more than 3 offences of the same kind had been included. The omission to enter each one of the *arzisals* was a separate offence, as each defalcation was a separate act and each omission related to a distinct and separate defalcation. The omission to enter the different *arzisals* was not part of the same transaction so as to be covered by section 235. It was not the case of a series of false entries with respect to the same defalcation, but in this case each omission was

(1) (1901) I. L. R., 25 Mad., 61.

1915

EMPEROR v. KALKA PRASAD

a distinct act, as the acts of defalcation were distinct. The second charge (b) therefore really included 120 offences and was bad. It was only in the special case of criminal breach of trust that the Legislature had specially declared that a charge under that section might cover several items of embezzlement and yet be *deemed* to be a charge for one offence. The phraseology of section 222 (2) clearly showed by the use of the word 'deemed' that the Legislature was merely allowing the lumping together of several items embezzled. It did not declare that such embezzlement was not a separate offence. Section 222 (2) could not be extended to any other section, e.g., section 477A. Secondly, the joinder of charges (a) and (b) in the same trial was bad. Secondly, the charge under the criminal breach of trust could be confined to 40 *annexures* and not to the falsification which carried all the 120. Even if it be conceded that the embezzlement of any item and a false entry or entries might be offences *in the same transaction*, yet a false entry with respect to an embezzlement not charged was quite another offence and not being committed in the course of the same transaction, could not be joined with a charge for embezzlement of other items. In the present case the embezzlements of the money covered by the 40 *annexures* and the omission to enter these 40 *annexures* might be two offences in the course of the same transaction, but this charge (b) were further and included the omission to enter other *annexures* also which were not an offence committed in the course of the same transaction as the embezzlement mentioned above. He relied on the following cases:—*Queen Empress* v. *Mati Lal* (1), *Empress* v. *Jiban Krishi* (2), *Roman Bakery* v. *King-Emperor* (3), *Kasi Viswanathan* v. *Emperor* (4), *Emperor* v. *Nathalal Bapuji* (5).

The Government pleader (Babu *Lalit Mohan Banerji*), for the Crown:—

The accused was not charged with several offences of falsification, but only with one viz., the falsification of the accounts book as a whole. The several items which the accused omitted to enter were merely evidence of his falsifying the account-book.

(1) (1899) I. L. R., 27 Calc., 500.
(2) (1912) I. L. R., 40 Calc., 318.
(3) (1913) 18 C. W. N., 1102.
(4) (1917) I. L. R., 30 Mad., 926.
(5) (1902) 4 Bom. L.R., 436

1915

EMPEROR v. KALKA PRASAD.

A man may strike another 30 strokes, yet it would be one offence of beating, just as a man may commit forgery with respect to an entire book consisting of many sheets, but yet the offence would be one. The offences in this case were very similar and were all committed with the same object and the several acts were really parts of the same transaction. The meaning of the expression "same transaction" was discussed in *Queen Empress* v. *Vajiram* (1).

RICHARDS, C. J.:—Kalka Prasad was charged with offences under sections 409 and 477A of the Indian Penal Code. He was sentenced to seven years' rigorous imprisonment under section 409 and to three years' rigorous imprisonment under section 477 A, together with a fine of Rs 4,000, the sentences to run concurrently. Kalka Prasad has appealed, and it has been argued on his behalf that there was a misjoinder of charges, contravening the provisions of section 233 of the Code of Criminal Procedure, which provides that (save as therein mentioned) there shall be a separate charge for every offence and that every such charge should be tried separately. The charge in the court below against the accused was that he being the *Tahvildar* embezzled a sum of Rs. 3,991-7-11, and further that he omitted to enter *awrisals* Nos. 1-120 with intent to defraud, and wrote on three of such *awrisals* nine numbers with like intent. The allegation is that it was his duty when receiving money to take a form of order from the person paying him the money. This document is called an *awrisal*. The law to enter in his book the particulars contained in the *awrisal*. It is alleged that in order to cover his defalcations he omitted to make those entries in respect of *awrisals* Nos. 1-120, and that with like intent he put false numbers on three of these documents. It is contended on behalf of the accused that while having regard to the provisions of section 222, clause (2), of the Code of Criminal Procedure, it is allowable in the charge to state the gross sum which has been misappropriated, there is no similar provision which permits more than three charges under section 477A to be joined together. It is contended that the accused, (if the allegations of the prosecution are true), committed a separate offence every time he omitted

(1) (1892) I. L. R., 16 Bom., 414.

1915

EMPEROR v. KALKA PRASAD.

to enter the particulars of each one of the *arzisals* in his book. It is further contended that the joinder of the counts for misappropriation with the count for falsification is contrary to law inasmuch as the charge or charges under section 477A are connected with alleged defalcations more extensive than the charge under section 409. Reliance is placed upon the recent ruling of their Lordships of the Privy Council, in which it was held that the joinder of charges in contravention of the provisions of section 233 is something more than an irregularity and vitiates the trial. I think the contention has force. Supposing in the present case there had only been charges under section 477A, it seems to me that there would have been a misjoinder of charges. The omission to enter the particulars of the *arzisals* in the book of the accused was for the purpose of concealing the alleged misappropriation of a distinct sum in each case. As the law stands only three such offences can be joined and tried at the same trial. In this respect charges under section 477 A differ from charges under section 409. I do not think that section 235 applies. The case was not that of making a number of false entries in various books, etc., to conceal one misappropriation. No doubt there was a similarity in the acts alleged to have been committed by the accused, and it is alleged that the transactions all took place within three days. Nevertheless, it seems to me that if the accused did what he was charged with, he committed a separate offence on each occasion, for which he was liable to a separate conviction and sentence. Notwithstanding that I consider that the accused was in no way prejudiced by the way in which the charges were framed, nevertheless there was in my opinion an illegality which vitiates the trial. I accordingly allow the appeal, set aside the conviction and sentence and direct that there be a new trial after charges have been framed according to law.

Appeal allowed. Conviction set aside. Re-trial ordered.

Before Mr. Justice Tudball and Mr. Justice Chamier.

EMPEROR *v.* MIAN DIN AND ANOTHER.* 1915 July 23.

Act No. III of 1867 (Public Gambling Act), section 3 and 2—"Place"—Bullock-run of disused well surrounded by low wall of loose bricks—Common gaming house.

Held that the lower end of a bullock-run round which, in the shape of a semi-circle, was raised a low wall of loose bricks, was a place within the meaning of the Public Gambling Act, 1867. *King Emperor v. Nana Mahomed Sher Mahomed* (1) followed. *Powell v. The Kempton Park Race Course Company Limited* (2) referred to.

In this case two persons, Mian Din and Fatehdalein, were charged with an offence under section 3 of the Public Gambling Act, 1867. The spot where the gambling was said to have taken place was the lower end of the bullock-run of a disused well on a piece of open land, round which had been raised a low semi-circular wall of loose bricks. Under the shelter of the wall the gambling complained of took place. The Magistrate acquitted the accused upon the ground that this spot was not a "place" within the meaning of sections 1 and 3 of the Public Gambling Act. Against this order of acquittal the present appeal was filed by the Local Government.

The Government Advocate (*Mr. A. E. Ryves*), for the Crown.

Mr. R. K. Sorabji, for the accused.

TUDBALL and CHAMIER, JJ.:—This is a Government appeal against an order of acquittal passed by a Magistrate of the first class in the case of two persons Mian Din and Fatehdalein who were charged with an offence under section 3 of the Public Gambling Act, 1867. The Magistrate passed his order on the finding that the spot where the gambling was taking place was not a "place" within the meaning of section 1 or section 3 of the Act. In section 1 a common gaming house is defined as "any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place" etc. The spot where the gambling is said to have taken place in the present case is the lower end of a bullock-run of a disused well on a bit of open land which

* Criminal Appeal No. 336 of 1915, by the Local Government, from an order of V. de V. Hunt, Cantonment Magistrate of Allahabad, dated the 29th of April 1915.

(1) (1913) I. L. R., 37 Bom., 651. (2) (1899) A. C., 143.

1915

EMPEROR v. MIAN DIN

there are some trees and a small hut. Round the sides of the bullock-run, in the shape of a semi-circle, has been raised a low wall of loose bricks and it is within the shelter of this low brick wall that the gambling is said to have taken place. The Magistrate has passed his opinion that it is not a 'place' within the meaning of the Act relying on a ruling to be found in the Punjab Records of 1896, No. 14, and on *Queen Empress* v. *Jagannayakulu* (1). He refused to follow *King-Emperor* v. *Fattoo Mahomed Sher Mahomed* (2). In our opinion the place where the gambling is said to have occurred in the present case falls within the definition of the word "place" in the Act. The question was discussed with some detail in the judgement in *King-Emperor* v. *Fattoo Mahomed Sher Mahomed* (2). In the Bombay Act the words are "whoever being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming house." The only difference between the Bombay Act and the Act which is in force in this province is that the words "walled enclosure" are added in the latter. The section runs—"Having the use of any house, walled enclosure, room or place." The Bombay Judges in their judgement refer to certain English cases in which a decision was given in regard to the meaning of the word "place" in sections 1, 2 and 3 of the English Betting Act which prohibit the use for betting of any house, office, room or other place. We agree with them that there is no reason to suppose that the word "place" in either of the two Indian Statutes has any more narrow or restricted meaning than it has in the English Statute. In *Powell* v. *Kempton Park Race Course Company Limited* (3) Lord HALSBURY remarked as follows:—"I think in this respect with RIGBY, L. J., that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the Statute." Lord JAMES of Hereford remarked:—"There must be a defined area so marked out that it can be found and recognized as the "place" where the business is carried on and wherein the bettor can be found." In the Bombay case the place which was under consideration was a piece of open land on which there was

(1) (1894) I. L. R., 18 Mad., 45. (2) (1913) I. L. R., 37 Bom., 651.
(3) (1899) A. C., 143.

neither roof nor wall but which was surrounded by houses and was approached by a narrow lane. In our opinion in the case which is now before us, the spot where the gambling is said to have taken place was a sufficiently defined area so marked out that it could be found and recognized as the place where the business of betting was being carried on. The argument has been raised that the adjective "walled" in Act III of 1867, applies not only to the noun 'enclosure' but also to the two nouns 'room or place.' With this we cannot agree. It is clear that the word "walled" is applied only to the word "enclosure." It could hardly in common parlance be used with the word "room." We therefore are of opinion that the decision of the Magistrate in so far as the meaning of the word "place" is concerned is incorrect, and we must therefore set aside the order of acquittal. At the same time the case is one of a very trivial nature. The accused have been subjected practically to two trials, one in the court below, and one in this Court, and we think that the ends of justice have been sufficiently met. We therefore do not direct that the accused be again placed upon their trial.

Order set aside.

1915 EMPEROR v. MIAN DIN.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir George Knox.

1915 *October*, 30

EMPEROR v. DHANI RAM AND ANOTHER*

Act No. X of 1873 (Indian Oaths Act), sections 5, 6 and 13—Act No. I of 1872 (Indian Evidence Act), section 118—Evidence—Statement of witness not recorded on oath—Capacity of child of tender years to testify.

The fact that a child has advisedly refused to take an oath does not render the statement of such witness inadmissible. But a court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the court thereof, and if the court is so satisfied it is but that the court should comply with the provisions of section 6 of the Indian Oaths Act, 1873, in the case of a child just as in the case of any other witness. *Queen-Empress* v. *Mahe* (1) dissented from.

THIS was an appeal from jail against a conviction under section 302 of the Indian Penal Code and a sentence of death. The Sessions Judge had based his judgment to some extent on

*Criminal Appeal No. 640 of 1915, from an order of D. R. Lyle, Sessions Judge of Agra, dated the 9th of August, 1915.

(1) (1888) I. L. R., 10 All., 207.

7

1915

EMPEROR v. DHANI RAM.

the statement of a small boy of some six years of age, to whom, however, in view of his tender years, he had intentionally omitted to administer an oath. In respect of such omission the evidence of this witness was challenged as being inadmissible in evidence regard being had to the provisions of the Indian Oaths Act, 1873.

The Government Advocate (*Mr. A. E. Ryves*), for the Crown.

RICHARDS, C. J., and KNOX, J.:—Dhani Ram and Chote Lal have been found guilty of the murder of Durga Prasad and sentenced to death. They have appealed. The second accused is the son of the first accused. The deceased was the only son of Sobha Ram, a brother of the first accused. The first accused had another son called Salig who died childless leaving a widow Musammat Deo Kunwar. On the 16th of August, 1914, Durga Prasad made a will in favour of the second accused leaving him all his property. Beyond all question Durga Prasad was most brutally murdered. Dhani Ram in the court below admitted the murder and he admits it in his petition of appeal. Chote, however, denies his guilt. The case for the prosecution is that the motive for the murder was to anticipate the succession to Durga Prasad's property and to prevent him incurring more debts, mortgaging or dealing with his property or cancelling the will.

[Their Lordships then proceeded to discuss the evidence against Dhani Ram.]

We proceed to consider the case as against the second accused. It is improbable that the father would have committed the murder alone. If we are correct in the view we take of the motive, Chote had a greater motive than the father.

A little boy of the name of Ram Rup, aged about six years, was examined in the court below. His statement is beyond question of the utmost importance. It directly implicates and if believed, brings home his guilt to the second accused. There is evidence that the boy made the same statement immediately after the murder. One of the grounds of appeal was based on the decision in the *Queen-Empress* v. *Maru* (1). The objection was that, the learned Judge having "advisedly" refrained from administering the oath to the little boy, his statement is inadmissible. We are not prepared to accept altogether the ruling in the case of

(1) (1888) I. L. R., 10 All., 207.

Queen Empress v. *Mara*. No doubt section 6 of the Indian Oaths Act of 1873 provides that (save as in the section provided) every witness shall make an oath. Section 13 of the Act, however, provides that no omission to take any oath shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. We are unable to hold that the mere fact that the court *advisedly* refrained from administering the oath renders the statement of the witness inadmissible. In our opinion a court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the court thereof. If the court is of opinion that by reason of tender years the child is unable to do this it ought not only to refrain from administering the oath but from examining the child at all. If, on the other hand, the court thinks that the child, though of tender years, is capable of informing the court of what it has seen or heard, it is best that the court should comply with the provisions of section 6 in the case of a child just as in the case of any other witness. Whether or not a child should be examined must depend on the circumstances of the particular case, including of course the nature of the evidence he is about to give. It seems to us pretty clear from the record that the boy Ram Rup was intelligent. We thought it nevertheless advisable to examine the boy ourselves the charge being the grave one of murder. We accordingly had the boy produced before us in the presence of the accused, the oath was duly given and the witness examined.

[Their Lordships then proceeded to discuss the evidence of the boy.]

After careful consideration of the case we are quite satisfied that the unanimous opinion of the learned Sessions Judge and of the assessors is correct. We dismiss the appeal, confirm the convictions and sentences and direct that the latter be carried into execution according to law.

Appeal dismissed.

1915
August, 2.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

THE MUNICIPAL BOARD OF ALLAHABAD (PLAINTIFF) *v.* TIKANDAR JANG (DEFENDANT).*

Act No IX of 1872 (Indian Contract Act), section 74—Sale—Construction of document—Conditions of sale—Penalty—Vendor not entitled to recover more than provided for by conditions of sale.

A Town Improvement Trust, having acquired land for the purpose of making a new road, thereafter proceeded to sell sites along the road. Amongst the conditions of sale were that the purchaser was to deposit 10 per cent of the purchase money immediately on the sale and the balance within nine months. There was a further condition that "if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall have liberty to resell the lot or lots sold to him either by public auction or by contract."

Held, on suit by the Trust against a purchaser who had paid only Rs. 1 at the time of his purchase and no more, that the plaintiff was only entitled to recover from the purchaser the 10 per cent. deposit which was one of the conditions of sale, and not the difference in price resultant on a resale of the property.

THE facts of this case were as follows:—

A scheme to open a congested area at Allahabad was started: considerable property was acquired, and a road was constructed. Plots of land on either side of the said road were sold by auction, and under the conditions of sale 10 per cent. of the purchase money was to be deposited by purchasers. The defendant purchased a plot for Rs. 3,000, paid one rupee only as earnest money, and failed to pay the balance within the time allowed under the conditions of contract. The property was sold a second time after due notice to the defendant and was sold at a loss. The present suit was brought for recovery of the difference in price between the two sales. The court of first instance decreed the suit. On appeal by the defendant the lower appellate court modified the decree, holding that the defendant was only liable to pay the 10 per cent. of the amount bid by him according to the conditions of sale. The following further condition of sale is material:—

"8. If any purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall be at

* Second Appeal No 906 of 1913, from a decree of S. R. Daniel, District Judge of Allahabad, dated the 22nd of January, 1913, modifying a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 11th of July, 1914.

liberty to resell the lot or lots sold to him either by public auction or by contract." The plaintiffs appealed to the High Court.

Mr. *B. E. O'Conor*, (with him Hon'ble Pandit *Moti Lal Nehru*) for the appellants:—

Section 74 which provides a penalty for breach of the contract does not deprive us of our remedy under the general law. A forfeiture, I submit, does not operate as a bar to the vendor's common law right. The right to damages is not lost merely by laying down a condition as to forfeiture of deposit. The case-law in England is limited. Improvement Trusts are of recent growth in India and few cases on the question are to be found in the courts in India. The forfeiture of a deposit is not a penalty under section 74. This is a case in which there is a forfeiture but it is not the sole remedy which the vendor can avail himself of in case of breach. I claim the loss under the general law under which a man who suffers loss can claim damages. Dart says that the vendor may either forfeit the deposit in case of failure or resell the property and claim damages even in the absence of such a condition (see page 179, 7th Ed.). This has been done in the present case; *Howe* v. *Smith* (1); *Ively* v. *Grew* (2); *Noble* v. *Edwardes* (3) is a case in point. The judgement was reversed in appeal, but upon another ground, and the decision of the single Judge is a pronouncement worthy of consideration. Court's Transfer of Property Act, 4th Ed., 619, relies upon this case and also on *Soper* v. *Arnold* (4). The provisions of section 74 were considered by the Madras High Court, which held that that section did not apply to cases of forfeiture, *Marian Pallai* v. *Madras Ry Co.* (5). The right to resale gives a right to damages in case of loss on resale; *Levy* v. *Stogdon* (6); *Levy* v. *Stogdon* (7); *Cornwall* v. *Henson* (8); *Wallis* v. *Smith* (9).

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent:—

The parties must be governed by the written contract, and that contract is absolutely silent as to the right to recover damages

(1) (1884) 27 Ch. D., 89, 101
(2) (1836) 6 N. and M., 207, 43 R.R., 566
(3) (1877) 5 Ch. D., 378.
(4) (1837) 38 Ch. D., 384.
(5) (1905) I. L. R., 29 Mad., 138.
(6) (1895) 1 Ch., 478.
(7) (1899) 1 Ch., 5.
(8) (1900) 2 Ch., 268.
(9) (1882) 21 Ch. D., 243.

1915

THE MUNICIPAL BOARD OF ALLAHABAD v. TIRANDAR JANG.

on the resale of the property. The conditions of sale were drawn up by an eminent barrister, and, regard being had to the formality of the document it should be strictly construed against the Trust. It is not the case that the right to recover such damages in the case of immovable property is known to common law. The passages in Dart on Vendors, relied on by the other side, does not contain a correct statement of law. The English cases referred to by Dart in his foot notes do not bear out the statement of law. Williams on Vendors and Leake on Contracts, 6th Ed., 711, state the effect of those cases correctly. There is no case which goes the length to which the plaintiffs wish the court to go. In every English case cited by the other side there was an express clause providing for recovery of damages on resale, which is not the case here. The case of *Ively* v *Grew* (1) was not a case of damages accruing on resale and is no authority in support of the plaintiff. Besides, there was an express clause providing for recovery of damages on resale. Even if the rule of common law is otherwise, it should not be applied in India, because, while section 107 of the Contract Act gives a right to the vendor to recover the difference between the price of the first sale and that of resale of goods there is no such section in the Transfer of Property Act which applies to immovable property. Further, it is a case governed by section 74 of the Contract Act. The case in 29 Madras is not a case directly in point and it overlooks the fact that under section 74, as amended by Act VI of 1899, the parties may treat the forfeiture of the deposit itself as a penalty. In the present case clause 8 of the conditions of sale is that the deposit shall be forfeited if the sale is not concluded and the vendor can resell. This provision is in the nature of a penalty, and, there being no other provision for further damages, all the Trust is entitled to claim is the deposit money and nothing more. He then discussed the cases cited by the appellant.

Mr. *B. E. O'Conor*, was heard in reply.

BANERJI and MUHAMMAD RAFIQ, JJ. :—The suit out of which this appeal has arisen was brought by the Allahabad Improvement Trust, represented by the Municipal Board of Allahabad, under the following circumstances. For the improvement of the town of

(1) (1836) N and M., 467, 43 R. R., 553.

1916

THE MUNICIPAL BOARD OF ALLAHABAD v. JWAHIR LAL.

Allahabad a road called the Hewett Road was opened out and land was acquired under the Land Acquisition Act. Portions of the land so acquired, not used for the road, were sold by auction under certain conditions set forth in a document which was signed by the Chairman of the Municipal Board and the purchasers bidding at the auction sales. The defendant purchased a plot of land for Rs. 3,900; he made a deposit of Rs. 1 only and did not pay the balance of the price. The Municipal Board, after a certain time, sold to the defendant, resold the land. The amount realized at the resale was Rs. 875. The present suit was instituted by the Board to recover the difference, namely, Rs. 3,025 from the defendant. The court of first instance decree the suit. Upon appeal, the learned District Judge modified the decree of that court and passed a decree in the plaintiff's favour for the amount of deposit which the defendant was bound to make under the terms of the contract. In our opinion the whole case turns upon the true construction of the provisions of the instrument called "the Conditions of Sale," which was the contract between the parties to which we have referred above. Clause 4 of this document provides that "each purchaser shall, immediately after the sale, pay into the Municipal Office, Allahabad, to the credit of the Allahabad Improvement Trust, a deposit of 10 per cent. of his purchase money and shall sign an agreement in the form subjoined and shall pay the residue of the purchase money into the said office within a period of nine months from the date of the sale, after which period the said amount the purchase shall be compulsorily forfeited." Clause 8 provides that "if any purchaser fail to comply with any of the above conditions, his deposit shall be forfeited and the vendor has full liberty to resell the lot or lots sold by immediately public auction or by contract." As we have stated above, the deposit required by clause 4 was not made, nor was the balance of the purchase money paid within the term fixed. There was thus a failure to comply with the conditions laid down in the document, and the provisions of clause 8 could be enforced. As we understand this clause, it gives the vendor the right to resell the lot; but the penalty which it provides is the forfeiture of the deposit which the purchaser was bound to make. The Municipal Board, upon the purchase being made by the defendant, was entitled to

1915

THE MUNICIPAL BOARD OF AHMADABAD v. TRIVADAR JANG.

obtain from the defendant the deposit of 10 per cent. of the purchas money. This amount they were entitled to recover under claus 8, as soon as a breach of the conditions of the document was com mitted. They also acquired the right to resell the property; bu under clause 8 the right to resale did not carry with it a righ to recover damages sustained by reason of any deficiency arising in the amount of purchase money realized by the resale. The parties must be bound by the contract which they entered into and we have to consider what their intention was when clause 8 was inserted in the document. If it had been intended that upon failure to perform any of the conditions of the sale, the vendee would be liable to pay damages arising upon a resale, one would have expected that such a condition would find place in the document. The absence of such a condition leads to the inference that the only penalty incurred by the vendee is the forfeiture of the 10 per cent. of the purchase money which he was bound to deposit. In this view the English cases and other authorities cited before us have no bearing on this case and need not be considered. In our opinion the decision of the lower appellate court is right and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

FULL BENCH.

1915
November 29

Before Justice Sir George Knox, Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

JIBAN KUNWAR (PETITIONER) v. GOBIND DAS (OPPOSITE PARTY).*

Act No. II of 1899 (Indian Stamp Act), schedule I, article 55—Stamps—Release—Partition deed.

Two persons, each of whom claimed the sole right to the property of a deceased relation, arrived at a compromise of their respective claims and gave effect thereto by means of two deeds of even date, by which deeds each relinquished in favour of the other his (or her) claim to a portion of the estate of the deceased.

Held that those deeds were releases, assessable to stamp duty under article 55 of the first schedule to the Indian Stamp Act, 1899. *Khushi S. Gowinda* v. *Jagannath S. Gowinda* (1) and *Reference under Stamp Act*, section 46 (2) referred to. *Reference under Stamp Act*, section 46 (3) distinguished.

* Civil Miscellaneous No. 194 of 1915.

(1) (1885) I. L. R., 9 Bom., 417. (2) (1896) I. L. R., 18 Mad., 238.
(3) (1889) I. L. R., 12 Mad., 199.

1916

JUGAL KISHORE v. GOBIND DAS.

THIS was a reference made by the Board of Revenue under section 57 of the Indian Stamp Act, 1899. The following were the facts out of which the reference arose :—

On the 23rd of August, 1914, one Mathura Das died childless leaving property of the estimated value of Rs. 2,25,000. The sister of the deceased applied for letters of administration. Gobind Das, a collateral of Mathura Das, disputed her claim. Eventually the two claimants effected a compromise, and to give effect to this compromise both the parties executed separate instruments of even date on the 14th of September, 1914. Each instrument was treated as a deed of release and was stamped with a stamp of Rs. 5. The instrument executed by Gobind Das was presented for registration and was impounded by the Sub-Registrar, who considered it to be an instrument of partition chargeable with a duty of Rs. 375. The instrument was sent to the Collector, who considered it to be a release and referred the case to the Board of Revenue under section 56 (2) of the Act. The Chief Controlling Revenue Authority gave it as their opinion that the two deeds read together constitute an instrument of partition liable to a duty of Rs. 375 under article 45, schedule I, of the Stamp Act.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the petitioner.

Babu *Sital Prasad Ghosh*, for the opposite party.

KNOX, MUHAMMAD RAFIQ and PIGGOTT, JJ. :—The following case has been stated by the Chief Controlling Revenue Authority of these Provinces to this Court under section 57 of the Indian Stamp Act of 1899. The case stated runs as follows :—On the 23rd of August, 1914, one Mathura Das died childless leaving property of the estimated value of Rs. 2,25,000. The sister of the deceased applied for letters of administration. Gobind Das, a collateral of Mathura Das, disputed her claim. Eventually the two claimants effected a compromise, and to give effect to this compromise both the parties executed separate instruments of even date on the 14th of September, 1914. Each instrument was treated as a deed of release and was stamped with a stamp of Rs. 5. The instrument executed by Gobind Das was presented for registration and was impounded by the Sub-Registrar, who considered it to be an instrument of partition chargeable with a

1915

JIBAN KUNWAR v. GOBIND DAS.

duty of Rs 375. The instrument was sent to the Collector, who considered it to be a release and referred the case to the Board of Revenue under section 56(2) of the Act. The Chief Controlling Revenue Authority gave it as their opinion that the two deeds read together constitute an instrument of partition liable to a duty of Rs. 375 under article 45, schedule I, of the Stamp Act. But as they consider the question as one of some difficulty the case has been referred to this Court. No one appears on behalf of the Chief Controlling Revenue Authority. The lady is represented in this Court by Dr. *Jay Kishor Sapru*, and Mr. *Sital Prasad Ghosh* appears for Gobind Das. We have heard the former advocate. The deeds have been read over to us. We have carefully considered their contents and we are satisfied that as the deeds stand they are instruments of release within the meaning of article 45, schedule I of the Stamp Act. The case as put by the lady in her deed is that under the Mayukh law she is the owner of the property left by the deceased Mathura Das. The case as put by Gobind Das in the document executed by him is that under the Mitakshara law he is the sole owner of the property in question. Neither of them states himself or herself as co-owner with the other or says they do so rightly. We, therefore, have not a case of persons purporting to be co-owners of the property and agreeing to divide the same. Each party before us claims to be the sole and full owner and, in order to avoid litigation, agrees to release in favour of the other a certain portion of the property which he or she claims to be his or her particular property in full. The Board of Revenue has cited *Reference under Stamp Act, section* 56(1) as applicable to this case. But that was a case in which the parties purported to be the co-owners of the property. The view which we take is supported by *Ekanth S. Gowrela* v. *Jagannath N. Gowrela* (2) and *Reference under Stamp Act, section* 46 (3). We direct that the be returned to the Chief Controlling Revenue Authority as our decision in this case. The deeds will be returned with the decision.

(1) (1883) I. L. R., 12 Mad., 168. (2) (1878) I. L. R., 2 Bom., 417.
(3) (1884) I. L. R., 16 Mad., 233.

APPELLATE CIVIL.

1915
November, 4

Before Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

SANHAWAT ALI SHAH (DEFENDANT) v. MUHAMMAD ABDUL KARIM KHAN (PLAINTIFF).*

Execution of decree—Sale of zamindari rights—Whether buildings pass with the zamindari share sold.

The doctrine that the sale by auction of a zamindari share includes also buildings situated within the zamindari is only applicable in the absence of evidence indicating an intention to exclude such buildings from the sale. *Atta Hosain* v. *Ramzan Ali* (1) distinguished.

THE facts of this case were as follows:—

Several persons obtained decrees against one Syed Haidar Shah, who was one of the zamindars of the village Khanpur. In execution of the decree of one Lachhmi Narayan the zamindari share of Syed Haidar Shah was sold and purchased by the plaintiff respondent. In execution of another decree obtained by one Lakkhi Mal against the same Haidar Shah the property called the *kila*, situate in Khanpur, was sold and purchased by the defendant appellant. The plaintiff respondent objected to the attachment and sale of the said *kila* in execution of the decree of Lakkhi Mal, but his objection was disallowed. He then brought the suit out of which this appeal has arisen for a declaration that by virtue of his purchase at auction sale he had become the owner of the share of Haidar Shah in the *kila* situate in Khanpur. The defendant appellant resisted the claim on the ground that all that the plaintiff respondent had purchased at the auction sale was the zamindari share of Haidar Shah. The objection of the appellant was disallowed by the lower courts and the claim decreed.

The defendant appealed to the High Court.

Dr. *S. M. Sulaiman* and Maulvi *Iqbal Ahmad*, for the appellant.

Maulvi *Shafi-ur-zaman*, for the respondent.

MUHAMMAD RAFIQ, *J.*—The dispute between the parties to this appeal is between two rival purchasers at auction sales. It appears

* Second Appeal No. 961 of 1914, from a decree of A. W. R. Cole, Esq., Additional Judge of Aligarh, dated the 15th of April, 1914, confirming a decree of Babu Behari Lal, Additional Subordinate Judge of Aligarh, dated the 9th of December, 1912.

(1) (1882) I. L. R., 4 All., 391.

1916.

SARHAWAT ALI SHAH v. MUHAMMAD ABDUL KARIM KHAN.

that several persons obtained decrees against one Syed Haidar Shah, who was one of the zamindars of the village Khanpur. In execution of the decree of one Lachhmi Narayan the zamindari share of Syed Haidar Shah was sold and purchased by the plaintiff respondent. In execution of another decree obtained by one Lakkhi Mal against the same Haidar Shah the property called the *kila*, situate in Khanpur, was sold and purchased by the defendant appellant. The plaintiff respondent objected to the attachment and sale of the said *kila* in execution of the decree of Lakkhi Mal, but his objection was disallowed. He then brought the suit out of which this appeal has arisen for a declaration that the plaintiff respondent by virtue of his purchase at auction sale is the owner of the share of Haidar Shah in the *kila* situate in Khanpur. The defendant appellant resisted the claim on the ground that all that the plaintiff respondent had purchased at the auction sale was the zamindari share of Haidar Shah. The objection of the appellant was disallowed by the lower courts and the claim decreed. In appeal the defendant repeats his plea and contends that all that was sold to and purchased by the plaintiff respondent at the auction sale of the 21st of March, 1910, was the zamindari share of Haidar Shah in Khanpur and that his interest in the *kila* was expressly excluded from the sale. The courts below have relied upon the ruling in *Abu Hasan* v. *Ramzan Ali* (1). The facts of that case were that the rights and interests of a zamindar in a certain zamindari village were sold in execution of a decree. At the time of the sale a certain building stood on the property of the judgement-debtor, i. e. in the village that was sold. The question was whether the sale of the zamindari included the sale of the building also. It was held that, in the absence of evidence showing that the building was excluded from the sale, the sale of the rights and interests in the zamindari included the sale of the building also. The principle of the case of *Abu Hasan* v. *Ramzan Ali* (1) cannot be applied to the present case for the reason that there is evidence upon the record to show that the sale of the rights and interests of Haidar Shah in Khanpur did not include his interest in the *kila*. The inventory of the property to be sold, filed by Lachhmi

(1) (1892) I. L. R., 8 All., 281

Narayan with his application for execution of decree mentioned nine lots of property, the first of which was the zamindari share of Haidar Shah and the ninth the *kila* situate in Khanpur. It was in accordance with this application of the decree-holder that the zamindari share only of Haidar Shah was brought to sale. The order of attachment and the order of *dakhal dihani* were drawn up in accordance with the inventory filed by the decree-holder, vide papers Nos. 18C., 17D., 131, 141, 153. These documents show that the sale of the 21st of March, 1910, did not pass the interest of Haidar Shah in the *kila* to the plaintiff respondent. I would therefore allow the appeal.

KNOX, J.—I fully agree with my learned brother. Neither the precedent *Abu Hasan* v. *Ramzan Ali* (1) nor that of *Banke Lal* v. *Jagat Narain* (2) is a safe guide in the present case. In the properties which were put to sale, the zamindari share without any specification was sold in the former and in the latter the sale notification distinctly described the property sold as being twenty biswas with gardens belonging to Ram Sarup and Piari Lal. The respondent cannot show in this case the sale notification. This is unfortunate, and, as it was one of the documents upon which his claim rests, if it had been in his favour he should have taken pains to have it produced and placed before us. The *dakhalnama* and the sale certificate upon which he relies are vague in their terms. Even if we take them as they stand, they do not show that the *kila* was sold. The lower courts should have seen to the production of this document. The sale notification is a most important document, as I have repeatedly pointed out in several of my judgements, when a court wishes to find out what was sold. I do not think that the lower courts were justified in arriving at the finding at which they did.

BY THE COURT.—The order of the Court is that this appeal is decreed with costs.

Appeal decreed.

(1) (1882) I. L. R., 4 All., 361 (2) (1890) I. L. R., 22 All., 168.

1915
November, 5.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MUNNI KUNWAR (PLAINTIFF) v. MADAN GOPAL (DEFENDANT).*

Act No IV of 1882 (Transfer of Property Act), sections 5, 6, 7 and 127—Minor—Validity of transfer in favour of a minor

Held that, inasmuch as there is nothing in the law to prevent a minor from becoming a transferee of immovable property, so a man on whose favour a valid deed of sale has been executed is competent to sue for possession of the property conveyed thereby. *Ujjal Koer* v. *Gauri Shankar* (1) and *Raghunath Baksh* v. *Haji Shaikh Muhammad Baksh* (2) referred to. *Mohori Bibee* v. *Dharmodas Ghose* (3) and *Navakoti Narayana Chetty* v. *Lopaimuga Chetty* (4) distinguished.

This was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case are fully stated in the judgement under appeal, which was as follows:—

"This case has had an unfortunate history. Mussammat Munni Kunwar, the plaintiff, sued for recovery of possession over a certain house. Her case was that the defendant Madan Gopal, who was her father-in-law, conveyed the house in question to her by a sale-deed, dated the 24th of September, 1901, and that she subsequently permitted him to reside in the same up to the year 1912. Having then desirous of occupying the house herself to the exclusion of the defendant, she served the latter with a notice to vacate the house, and the cause of action is stated to have accrued to her on the 24th of February, 1913, the date of the defendant's refusal to vacate the house in accordance with the notice. The defendant replied that he had executed the sale-deed in suit in favour of his daughter-in-law without any consideration, as a colourable and fictitious transaction, and had remained in possession of the house ever since as proprietor. He alleged that his son, Baldeo Singh, husband of the plaintiff, having subsequently died the plaintiff had gone to live with her own father and was now bringing this suit in collusion with her father, although both of them were perfectly aware of the fictitious nature of the sale-deed of the 24th of September, 1901. The case went to trial upon a plain issue of fact as regards the alleged fictitious nature of the sale-deed and the passing or otherwise of the consideration. At a very late stage of the case it seems to have occurred to the learned Munsif that there was evidence on the face of the record to show that the plaintiff Mussammat Munni Kunwar must have been a minor in the month of September, 1901. He seems to have thought that this incident might form a short cut to the determination of the suit, without necessitating a trial of any of the questions of fact raised by the pleadings of the parties. He framed a fresh issue, and eventually dismissed the suit on the ground that whatever may or may not have happened at the time of the execution of the sale-deed of 1901, the fact that the plaintiff was

* Appeal No. 32 of 1915, under section 10 of the Letters Patent.

(1) (1911) I. L. R., 33 All., 697.
(2) (1915) 18 Oudh Cases, 115.
(3) (1903) I. L. R., 30 Calc., 539.
(4) (1909) I. L. R., 33 Mad., 312.

1915

MUSSMT. KUNWAR P. MADAN GOPAL.

then a minor was conclusive against her. This decision was affirmed by the District Judge on appeal. When the matter came before me in June last I found it necessary, for reasons which need not now be discussed, to remand the case in order that the plaintiff might have an opportunity of placing on the record certain evidence which had, in my opinion, been wrongly rejected at the trial in the court of the Munsif. I asked the lower appellate court, after recording this evidence, to reconsider its decision in the light of that evidence and to state whether the pleas taken in the first two paragraphs of the memorandum of appeal to the lower appellate court ought or ought not to prevail in the light of the evidence on the record taken as a whole. I may now add that to think that, as I was remanding the case, I should have exercised a wiser discretion if I had insisted on a clear finding of fact as to the passing of the consideration and as to the alleged fictitious nature of the sale-deed. It appears that, when the plaintiff originally led evidence in the Munsif's court, she first stated that she was a minor in the year 1901 was not prepared to be bound on to that of her legal adviser. The case put forward by her was that the money which formed the consideration for the sale was a gift to her from her father, and that she had negotiated the sale and paid over to the defendant the money thus received by her as a gift. When the question of minority was raised, the plaintiff appears, as the learned District Judge has remarked, to have very materially shifted her ground. She then led evidence to prove that her father had negotiated on her behalf the transaction of sale with the defendant, had paid over the money to the defendant on her behalf and had executed a sale-deed of the house to be executed in her name. If this were so in fact, the transaction would really amount to an acquisition by the plaintiff's father from the defendant of a certain house and a gift of that house to the plaintiff by her father. The provisions of section 127 of the Transfer of Property Act (Act IV of 1882) show that a gift in favour of a minor is not void, though it may be voidable at the option of the minor. I should find no difficulty in holding that, if the facts were as above stated, the present suit would be barred by time. As the case stands the learned District Judge has dismissed the plaint and rejected the evidence tendered by the plaintiff subsequently to my order of remand. He holds that, whatever else may have happened in connection with this contract of sale, it is not a fact that the sale was negotiated by the plaintiff's father and the purchase made by him on the plaintiff's behalf. I think it unfortunate that the courts below should not have proceeded further, and considered the effect of the plaintiff's change of attitude and the conflicting nature of the evidence tendered by her, with regard to the plaint's case of the fact raised by the pleadings as they originally stood. As the case stands I have no finding before me that consideration did or did not pass, or as to whether the execution of this sale-deed of the 24th of September, 1901, was not after all, as the defendant has all along pleaded, a purely fictitious transaction. I have to look at the question of law raised in this way. Assuming for the sake of argument that in the month of September, 1901, the plaintiff, being at the time a minor, negotiated the sale of the house in suit with the defendant and paid over certain money to the defendant, receiving in return the sale-deed which is the basis of the present suit, is that contract of sale void on the ground of the

1913

MUNSI KUNWAR v. MADAN GOPAL.

plaintiff's minority or can the plaintiff be said to have become by virtue of this transaction the owner of the house in suit? The leading cases on the subject are the recent decisions of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1) and in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (2). The Madras High Court in *Nanjappa Chetty* v. *Lepakshya Chetty* (3) has interpreted these rulings as laying down in the broadest terms the principle that a sale in favour of a minor is void. The reasoning of the learned Judges in arriving at this decision commends itself to my mind and I do not think it necessary to reproduce it here. It has been suggested that the current of decision in this Court has always been in another direction, from the time of the earliest case on the point, that of *Bahori Lal* v. *Bani Lal* (4) in which a mortgage in favour of a minor was affirmed. Their Lordships of the Privy Council in *Mohori Bibee's* case pointed out that there had been some conflict of decisions in the Indian Courts, and considered it necessary to review the whole question of a contract to which a minor was a party with reference to the special provisions of the Indian Contract Act (Act IX of 1872). Any rulings prior to the date require to be reconsidered with reference to the principles laid down by the Privy Council.

"The next case in the plaintiff's favour is that of *Ujfat Rai* v. *Gauri Shankar* (5). It was there pointed out that the Transfer of Property Act in itself contains no provision which makes a minor incapable of being a transferee of immovable property. That case, however, requires to be considered with reference to its own facts. The transfer was one by the minor's certificated guardian in favour of the minor. The transaction as a whole certainly admitted of being regarded as a gift subject to a condition, and such transfer by way of gift would be voidable at the option of the minor under the provisions of the Transfer of Property Act to which I have already referred. It is quite true, as has been pointed out by this Court in more than one case, (vide, 9 A. L. J., 106 at page 201) that there is a fundamental distinction between a contract and a conveyance; but it seems to me that this point might be stated with equal accuracy by saying that a conveyance is a contract *plus* something more. At any rate, as the learned Judges of the Madras High Court have pointed out in the ruling already referred to, a conveyance by way of a sale, either is in itself a contract, or at any rate involves or implies an antecedent contract. On the principles laid down by their Lordships of the Privy Council in the cases already referred to it seems to me impossible to avoid the conclusion that a contract of sale negotiated by a minor, the minor having settled the terms, paid consideration and received in return a deed purporting to convey immovable property by way of sale, is altogether void absolute and that no title thereby passes to the minor.

"The suit as brought must therefore fail. It has been suggested that, in the alternative, the plaintiff should be given a decree for the refund of the purchase money. I may remark at once that I could not do this without

(1) (1903) I. L. R., 30 Calc., 539. (3) (1909) I. L. R., 33 Mad., 312.
(2) (1911) I. L. R., 39 Calc., 292 (4) (1881) I. L. R., 3 All., 408.
(5) (1912) I. L. R., 33 All., 657

once more remanding the case to the court below for a finding as to whether the alleged sale consideration did or did not pass from the plaintiff to the defendant. It seems to me, however, that from any point of view the claim is not one which can be entertained in the present suit. It was not expressly put forward in the plaint and it is now sought to be based on the general prayer for any other relief which is contained in the last paragraph of the plaint. If the plaintiff is regarded as claiming the refund of the sale consideration as money payable by the defendant for money received by the defendant for the plaintiff's use (article 62 of the first schedule to the Limitation Act, IX of 1908), then the claim is time-barred, because it does not appear to have been brought within three years from the plaintiff's attaining majority. For the same reason the claim cannot be sustained as perhaps might otherwise have been, as a claim for relief on the ground of fraud.

"The only other suggestion which has been, or can be, put forward on behalf of the plaintiff is that the claim for refund of purchase money might be sustained as a claim for money paid upon an executory consideration which afterwards fails. In that case article 97 of the said limitation already referred to would apply; but it would be for the plaintiff to show when it was that the consideration failed. There is authority in the case of *Amma Bibi* v. *Lalit Narain Misra* (1) for giving the plaintiffs in a case somewhat similar to the present a decree for refund of the money paid, and for applying article 97 of the first schedule to the Limitation Act to such a suit. But in that case, however, as also in a similar case reported in I. L. R., 24 Mad., page 47, there had been a previous suit resulting in an adjudication between the parties in consequence of which the plaintiff had failed to obtain the property for the price of which he claimed in the second suit; limitation was held to run against the plaintiff from the date of the final decision in the first litigation holding the plaintiff's claim to the property to be unenforceable. If the principles are in fact applicable to the present case, it may be that the plaintiff will have a cause of action from the date of the dismissal of the present appeal, but that is not a matter as to which it is necessary for me to express a final opinion in order to dispose of this appeal. So far as this claim for refund of purchase money goes, I hold that the plaintiff, supposing her to be in fact entitled to such refund, has either a cause of action which has become barred by time, or a cause of action which has not yet arisen and will arise only on the failure of the present suit. For these reasons I dismiss this appeal with costs."

The plaintiff appealed.

At the first hearing of the appeal the Court referred an issue to the District Judge:—

"Was the sale-deed of the 24th of September, 1901, a fictitious transaction, or was it supported by consideration?"

The finding returned was that the transaction was not fictitious and that the consideration was paid by the plaintiff's father.

(1) (1909) I. L. R., 31 All., 68.

1915

MUSSU KUNWAR v. MADAN GOPAL.

Dr. *S. M. Sulaiman*, for the appellant :—

Conveyance is something more than a contract; as soon as the sale-deed is executed the transaction passes from the domain of contract into that of conveyance. Now contracts are governed by the Contract Act which requires mutuality; but conveyances are governed by the Transfer of Property Act. Section 5 defines transfer, and it does not necessarily require anything to be done by the transferee before the transfer is complete. Section 7 of the Transfer of Property Act, requires that a transferor must be a person competent to contract; whereas section 6 *(h)* contains no such requirement in case of a transferee; it only says that he must not be legally disqualified from being a transferee. Now there is no provision of law which legally disqualifies a minor from being a transferee. Section 136 of the Transfer of Property Act shows the kind of persons who are so disqualified, and a minor is not included therein. On the other hand, section 127 expressly shows that a minor can be a donee. Section 54, which defines sale, does not require anything to be done by the vendee before it is complete; hence competency to contract cannot be essential. In the case relied upon by PIGGOTT, J viz., *Narakotti Narayana Chetty* v. *Logidasu Chetty* (1) it seems that the minor had promised to pay the price and hence it must be said that there was no mutuality. The Privy Council case of *Mohori Bibee* v. *Dharmodas Ghose* (2) does not apply, as it was a case of contract. The cases in point are *Raghunath Baksh* v. *Haji Sheikh Muhammad Baksh* (3) and *Ujfat Rai* v. *Gauri Shankar* (4). A minor therefore, it is submitted, can be a transferee. Here it has been found that the father of the minor paid the money by cheque.

Mr. *A. P. Dube*, for the respondent :—

The original finding of the District Judge in this case was, and his finding on remand has been, that the sale was negotiated by the minor herself throughout. The case has all along been dealt with on that footing, as is evident from the judgement of the single Judge of this Court. Upon the issue as to whether consideration did actually pass, the finding has been returned in the affirmative. The fact that

(1) (1909) I. L. R., 33 Mad., 312.
(2) (1903) I. L. R., 30 Calc., 539.
(3) (1915) 19 Oudh Cases, 115.
(4) (1911) I. L. R., 33 All., 657.

1915

MUSSI KUNWAR v. MADAN GOPAL.

the learned District Judge says that the father paid the money by cheque cannot be allowed to disturb his previous findings, because this was not the issue sent down on remand. The Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1) has distinctly held that a contract by a minor is void and not voidable. No distinction can be drawn between contract and a conveyance. A conveyance is nothing but an executed contract. Conveyance is that portion of an executed contract in writing which actually purports to convey property from the seller to the buyer. The transaction as evidenced by the sale-deed is a contract of sale and the actual clauses conveying property cannot be treated as something entirely distinct from the executed contract as put down in the deed. Those clauses cannot be taken out of their setting. The deed, it is true, is not signed by both parties; but a mortgage-deed is not signed by both parties, yet it was in *Mohori Bibee's* case dealt with as a contract. A minor may take by gift, which is a unilateral transaction, but a sale pre-supposes both offer and acceptance by a minor being a bilateral one. The Privy Council were dealing with a mortgage under the Transfer of Property Act, but on consideration of sections 4 and 7 of that Act, held that the matter must be decided in accordance with the provisions of the Contract Act. If a minor can enforce a contract, we get back to the old state of a voidable contract. Conveyance is not different from contract. See Blackburn on Sale, Preface, and pages 129, 130, 131. The same distinction between a contract to sell and contract of sale is maintained by the Transfer of Property Act, section 54. In *Mir Narmarayan's case* (2) a sale was made in favour of a minor. The manager had intervened and actually paid the consideration. But their Lordships held that the minor could not get specific performance because there was no mutuality. This case is nothing but a case of specific performance. A contract was entered into which purported to pass title and possession. The minor claims possession in virtue of the title so passed. When the contract goes everything founded upon it or resulting from it ought to go. Trevelyan in his book on Minors says that the effect of the Privy Council ruling is that no effect could be given to the transaction

(1) (1903) I. L. R., 30 Calc., 539.

(2) (1911) I. L. R., 39 Calc., 252.

1915

MUNSI KUNWAR v. MADAN GOPAL.

at the instance of either party. I rely on the reasoning of I. L. R., 33 Mad., 312, and on the reasoning of the learned single Judge of this Court.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—By our order, dated the 9th of July, 1915, we referred an issue to the court below. The finding on this issue has now been returned. We think it desirable very shortly to refer to the nature of the suit. The plaintiff is the daughter-in-law of the defendant. The suit is a suit to recover possession of a house. The house admittedly belonged at one time to the defendant. The house was under attachment in execution of a decree against the defendant. Before the sale a deed of transfer was executed by the defendant in favour of the plaintiff. She was his daughter-in-law, and her husband (the son of the defendant) was then alive. It was alleged on behalf of the plaintiff that she paid the purchase money of the house and became the purchaser. It was alleged on behalf of the defendant that the whole transaction was fictitious and that no consideration of any kind ever passed. As the result of the finding of the court below on the issue we referred, it is now established that the money was really paid by the father of the plaintiff at the time of the attachment and was duly received by the defendant. There can be no doubt (whether the money actually belonged to the plaintiff or belonged to her father) that the purchase was intended for her benefit. The question is whether under these circumstances the plaintiff was entitled to recover possession of the property, it being borne in mind that at the date of the deed of transfer she was under age. It is contended on behalf of the defendant that the contract for sale of the house was absolutely null and void, and the decision of their Lordships of the Privy Council in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1) and also the case of *Navakotti Narayana Chetty* v. *Logalinga Chetty* (2) are relied upon. On the other side the case of *Ulfat Rai* v. *Gauri Shankar* (3) and also the case of *Raghunath Baksh* v. *Haji Sheikh Muhammad Baksh* (4) are relied upon. Section 5 of the Transfer of Property Act defines "transfer of property" as an act by which a living

(1) (1903) I. L. R., 30 Calc., 539.
(2) (1909) I. L. R., 33 Mad., 312.
(3) (1911) I. L. R., 33 All., 557.
(4) (1916) 38 Oudh Cases, 115.

person conveys property to one or more other living persons, or to himself and one or more living persons. Section 6, clause (*h*), of the same Act sets forth the class of transfers of property which cannot be made. It does not state that a transfer cannot be made to a minor. Section 7 provides that every person competent to contract and entitled to transferable property is competent to transfer such property. Nowhere in the Act is it provided that a minor is incapable of being a transferee of property, and as a matter of practice, we are well aware that transfers of immovable property are every day made to minors. Section 127 by necessary implication shows that a person who is not competent to contract may be the donee of immovable property, and that even in the case of property burdened with an obligation it after he has become competent to contract and aware of the obligation he retains the property he becomes bound. It seems to us that the argument on behalf of the defendant amounts to this: that the present suit to recover possession of the house must be regarded in exactly the same way as if the plaintiff was bringing a suit for specific performance of a contract. In our opinion it ought not to be so regarded. It could hardly be said, if it was shown beyond all doubt that the father of the plaintiff entered into a contract for the sale of this property and instead of taking the conveyance himself had directed the vendor to execute the conveyance in favour of his daughter, that she would not be entitled to recover possession. This in all probability was exactly what happened in the present case, but even if we assume on behalf of the defendant that it was the girl herself who entered into the contract and that it was her money which was paid to the defendants, it can make no difference. As soon as the defendant received the purchase money and executed the conveyance the plaintiff became entitled to the possession of the property. Very different considerations would arise if after having agreed to sell the property the defendant before receiving the price had refused to execute a conveyance and the plaintiff was driven to a suit for specific performance. In such case the plaintiff would have to set up the contract. In our opinion the decision of the court below and also of the learned Judge of this Court were not correct. We accordingly allow the appeal, set aside both the decrees of the

1916

MUSST. KUNWARI v. MADAN GOPAL.

1915

MUNSI KUNWAR v. MADAN GOPAL.

courts below as also the decree of the learned Judge of this Court and decree the plaintiff's claim with costs in all courts.

Appeal decreed.

1915 *November*, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

HAR PRASAD (OBJECTOR) v. MUKAND LAL (APPLICANT).*

Act (Local) No III of 1901 (United Provinces Land Revenue Act), section 111 (1) (b)—Partition—Non-appearance required to file suit in civil court—Non-compliance with order—Appeal.

A Collector trying a partition case made an order under section 111 (1) (b) of the United Provinces Land Revenue Act, 1901, against the non-applicant. He failed to comply with this order. It alleged that in a civil suit between the parties to the partition case it had been decided in respect of certain non-revenue-paying property that both sides were members of a joint Hindu family. The Collector, however, overruled his objection, stating that the ruling did not apply to revenue-paying property.

Held that no appeal lay to the District Judge from this order.

THE facts of this case were as follows:—

One Mukand Lal presented an application in the Revenue Court against Har Prasad alleging that he was entitled to 7ths of the recorded property and claiming partition. Har Prasad filed an objection that Mukand Lal's share was only one-half and the other half belonged to him. This matter having come before the Collector he made an order under section 111 of the Land Revenue Act requiring Har Prasad to bring a suit in the Civil Court within three months to determine the question. Har Prasad never brought any such suit. He alleges, however, that there was pending in the Civil Court a suit for partition brought by Mukand Lal in respect of non-revenue-paying property, and that it was decided in that suit that they constituted a joint Hindu family and were therefore on partition entitled to all the joint property half and half. After the expiry of three months, when the case again came before the Collector it was found that Har Prasad had not complied with the order. He tried to make out that the finding of the Civil Court had settled the question. The Collector made an order in which he stated that the Civil Court's decision had nothing to do with the revenue-paying property. The Collector accordingly overruled the objection which had been

* Final Appeal No. 112 of 1915, from an order of F. S. Tabor, District Judge of Saharanpur, dated the 15th of May, 1915.

1915

HAR PRASAD v. MUKAND LAL.

filed by Har Prasad. Against this order Har Prasad filed an appeal in the District Judge's Court. The District Judge held that no appeal lay to him and returned the memorandum of appeal for presentation to the proper court.

Har Prasad thereupon appealed to the High Court.

Mr. Nihal Chand, for the appellant.

Dr. Surendra Nath Sen, for the respondent.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises under the following circumstances. Mukand Lal presented an application in the Revenue Court against Har Prasad alleging that he was entitled to $\frac{1}{2}$ as of his recorded property and claiming partition. Har Prasad filed an objection that Mukand Lal's share was only one-half and the other half belonged to him. This matter having come before the Collector he made an order under section 111 of the Land Revenue Act requiring Har Prasad to bring a suit in the Civil Court within three months to determine the question. Har Prasad never brought any such suit. He alleges, however, that there was pending in the Civil Court a suit for partition brought by Mukand Lal in respect of non-revenue-paying property, and that it was decided in that suit that they constituted a joint Hindu family and were therefore not partition entitled to all the joint property half and half. After the expiry of three months, when the case again came before the Collector it was found that Har Prasad had not complied with the order. He tried to make out that the finding of the Civil Court had settled the question. The Collector made an order in which he stated that the Civil Court's decision had nothing to do with the revenue-paying property. The Collector accordingly overruled the objection which had been filed by Har Prasad. Against this order Har Prasad filed an appeal in the District Judge's court. The District Judge held that no appeal lay to him and returned the memorandum of appeal for presentation to the proper court. Section 111 of the Revenue Act provides that when an objection is made by a recorded co-sharer involving a question of proprietary title one of three courses is open to the Collector: he may either decline to grant the application until the question be settled by a competent court, or he may require any party to the case to institute a suit in the Civil Court within three months to settle

1915

HAR PRASAD v. MUKAND LAL.

the question or he may proceed to inquire into the merits of the objection himself. Clause (3) provides that if this last mentioned course is adopted the Collector is to follow the procedure laid down in the Code of Civil Procedure for the trial of original suits, and in that case an appeal lies to the District Judge (section 112). It is clear that no appeal lies to the District Judge when the Collector makes an order under clauses (*a*) and (*b*) of section 111 (1). Clause (2) provides that if the Collector requires a party to bring a suit within three months and he fails to comply with the requisition, the Collector must decide the question against him. It is contended on behalf of the appellant that he substantially complied with the order of the Collector directing him to institute a suit. We find that all he did was to put in a defence to the effect that the family was a joint family and that the suit should be dismissed on the ground that all the family property had not been included in the suit. It is stated (probably correctly) that the result of this defence was that Mukund Lal's suit for partition in the Civil Court was dismissed. In our opinion what Har Prasad did was in no way a compliance with the order of the Collector directing Har Prasad to institute a suit in the Civil Court within three months. Even if we assume that Har Prasad substantially complied with the order of the Collector and that the latter should have decided in favour of Har Prasad, the section does not provide for an appeal in such case to the District Judge. We think the court below was right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1915

November, 22.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

KHETRA (DEFENDANT) *v.* MUMTAZ BEGAM (PLAINTIFF) AND INAM ALI KHAN (DEFENDANT).*

Civil Procedure Code (1908), order XXI, rule 63—Execution of decree—Suit for declaration that property is not liable to attachment and sale—Valuation of suit.

Held that in a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but

* First Appeal No. 253 of 1913, from a decree of Shankar Nath Banerji, Subordinate Judge of Agra, dated the 1st of August, 1913.

1915

KHUDA
v.
MUMTAZ
BEGAM.

the amount for which the decree may be executed. *Durga Das* v. *Kameshar Prasad* (1) and *Dhan Devi* v. *Ramanand Tewari* (2) were referred to. *Hari Narain* v. *Ghanshyam Misra* (3) referred to.

THE facts of this case were as follows:—

The first defendant, who is the appellant here, holds a decree against the second defendant, the husband of the plaintiff respondent. In execution of that decree he caused the property in suit to be attached as the property of his judgement-debtor. An objection was preferred by the plaintiff claiming the property under a sale deed alleged to have been executed in her favour on the 22nd of May, 1912. Her objection having been overruled she brought the present suit on the 4th of January, 1913, and asked for a declaration that the property in suit "was not liable to attachment and sale in satisfaction of the amount due to defendant No. 1," and she also prayed that her right to the property be declared. She alleged the date of the cause of action to be the 4th of January, 1913. No doubt she made her husband a party to the suit, but she asked for no relief against him and did not allege any cause of action which would entitle her to sue him. Apparently her husband was only made a formal defendant to the suit. The lower court decreed her claim and the decree-holder, the defendant No. 1, has preferred this appeal.

Pandit *Shiam Krishna Dar* and Babu *Narain Prasad Asthana*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Mr. *Hon Ahmad* and Babu *Girdhari Lal Agarwala*, for the respondents.

BANERJI and TUDBALL, JJ.:—The first question which arises in this appeal is whether the appeal lies to this Court. For the decision of that question we have to determine what was the value of the subject matter of the suit in the court below. If the amount of that value was below Rs. 5,000, the appeal would not lie to this Court but lay to the court of the District Judge. The suit was brought under the following circumstances. The first defendant, who is the appellant here, holds a decree against the second defendant, the husband of the plaintiff respondent. In execution of that decree he caused the property in suit to be attached as the property of his judgement-debtor. An objection

(1) (1894) I. L. R., 17 All., 69. (2) (1905) I. L. R., 27 All., 340.
(3), (1907) I. L. R., 35 Calc., 202.

1916

KHEIRA v. MUNTAZ BEGAM.

was preferred by the plaintiff claiming the property under a sale deed alleged to have been executed in her favour on the 22nd of May, 1912. Her objection having been overruled, she brought the present suit on the 4th of January, 1913, and asked for a declaration that the property in suit " was not liable to attachment and sale in satisfaction of the amount due to defendant No. 1," and she also prayed that her right to the property be declared. She alleged the date of the cause of action to be the 4th of January, 1913. No doubt she made her husband a party to the suit, but she asked for no relief against him and did not allege any cause of action which would entitle her to sue him. Apparently her husband was only made a formal defendant to the suit. The lower court decreed her claim and the decree-holder, the defendant No. 1, has preferred this appeal. No doubt in the plaint the value of the subject matter for purposes of jurisdiction is stated to be Rs. 25,000, but this in our opinion was clearly erroneous. As we have already said, the plaintiff claims no relief against her husband and she does not allege any cause of action as against him. All that she asks for is that it be declared that the amount of the decree held by the first defendant ought not to be realized from her property, that is, from so much of it the value of which would be equivalent to the amount of the decree. It is admitted in this case that the amount of the decree is about Rs. 2,000. It is therefore clear that the object of the suit is to relieve the property from a burden to the amount of Rs. 2,000 which the decree-holder, defendant No. 1, is seeking to impose on it by attaching the property. The whole of the property is not in dispute, and under the attachment and the sale which might take place in pursuance of it, the whole property cannot be sold, but only so much of it as will be sufficient for the realization of the amount of the decree. Therefore, the value of the subject matter of the suit is the amount of the decree and not the amount of the actual value of the property or the value for which the plaintiff alleges that she purchased it. The point was decided by this Court in the case of *Dwarka Das* v. *Kameshar Prasad* (1), and the same view was adopted in *Dhan Devi* v. *Zamurrad Begam* (2). The matter was considered by their Lordships of the Privy Council

(1) (1896) I. L. R., 17 All., 69. (2) (1906) I. L. R., 27 All., 440.

1915

KUNDAN
v.
MUKTAR
BEGAM.

in the recent case of *Phul Kumari* v. *Ghanshyam Misra* (1). The exact point which is now before us was not in issue before their Lordships, but there are observations in the judgement which clearly support the view taken by this Court. Their Lordships say, "the value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000 while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In the case before us the amount of the decree is below Rs. 5,000 and much below the actual value of the property. Therefore, according to the view expressed by their Lordships, the value of the suit should be regarded as the amount of the decree. That amount being less than Rs. 5,000, an appeal from the decree of the court below lay to the District Judge and not to this Court. We accordingly direct that the memorandum of appeal be returned to the appellant for presentation to the proper court. Under the circumstances we make no order as to the costs of this appeal.

Memorandum of appeal returned.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

1915

November, 25

SITAL PRASAD (Defendant) v. LAL BAHADUR (Plaintiff) and GOBIND PRASAD (Defendant)*

Civil Procedure Code (1908), order XXIII, rule 3—Compromise—Petition of compromise filed in subsequent suit—Registration—Act No XVI of 1908 (Indian Registration Act), section 17.

In a suit for a declaration of title to certain immovable property the plaintiff applied to the Court stating that the suit had been compromised and asking that a decree might be made under order XXIII, rule 3, of the Code of Civil Procedure.

In support of this application he filed a copy of a petition which had been presented shortly before by both parties to the Revenue Court in proceedings for mutation of names in respect of the same property as was in the dispute in the Civil Court, and which set forth that the matter before the Revenue Court had been compromised in the manner therein stated. The petition had been accepted and acted upon by the Revenue Court.

Held that the petition was evidence in the Civil Court that the matter in dispute between the parties had been adjusted out of Court, and that it did not require to be registered.

---

* First Appeal No 91 of 1914, from a decree of Munsi Lal, Subordinate Judge of Cawnpore, dated the 20th of December, 1913.

(1) (1907) I. L. R., 35 Calc., 202.

1915

SITAL PRASAD v. LAL BAHADUR.

THE facts of this case were as follows:—

One Musammat Raj Rani Kunwar died on the 19th of March, 1913, possessed as a Hindu widow of zamindari properties. Lal Bahadur, plaintiff, and Sital Prasad, defendant, were rival claimants to the estate, and each of them applied to the Revenue Court for mutation in his own favour. While mutation proceedings were going on, the plaintiff instituted the present suit for a declaration that he and his brother being the nearest reversioners were entitled to the whole estate. Sital Prasad resisted the suit and claimed to be the nearest reversioner on the ground that he was a sapinda of the last male owner. On the 23rd of October, 1915, the parties jointly presented a petition to the Revenue Court stating that the disputes between them had been compromised in this way that "we, Lal Bahadur and Gobind Prasad objectors (in the mutation court) have agreed to recognize that Lala Sital Prasad, applicant (for mutation) has a right in ½ of the property in dispute as a sapinda of the deceased persons . . and I, Sital Prasad, have agreed to recognize that Lal Bahadur and Gobind Prasad objectors aforesaid have a right in the property in dispute to the extent of ¼ share," and praying that mutation might be made accordingly. After noting other terms of the compromise, the petition went on to state that "I, Sital Prasad applicant, and we, Lal Bahadur and Gobind Prasad, will always and at all times abide by the terms of the compromise in every Revenue or Civil Court and in the Court of Wards, etc. In case of violation of the said terms, which, God forbid, may be committed at any time by any one of the parties, the other party will have power to compel the said party to abide by the said terms, by bringing a suit in court or by any other proper means." The petition having been attested in court, mutation was ordered "in accordance with the compromise entered into" by the parties. Subsequently when the suit came on for hearing in the Civil Court, the plaintiff made an application stating that the suit had been settled by the parties out of court, and prayed that it may be decreed in the terms of the compromise, and he filed a certified copy of the above-mentioned petition in support of his allegations. The defendant admitted that he had made the compromise, but alleged undue influence. Besides the petition in the Revenue

1915

SHAM PRASAD v. LAL MOHABIR.

court, no oral evidence was given in support of the compromise. The lower court held that the petition in the Revenue Court was admissible in evidence and did not require registration, and having negatived the plea of undue influence, it passed a decree in terms of the compromise. The defendant appealed to the High Court.

Mr. *M. L. Agarwala*, (with him Munshi *Benode Behari*), for the appellant :—

The petition filed in the Revenue court was, for want of registration, inadmissible in evidence. It was an instrument which purported to declare a right, title or interest to or in immoveable property, and was as such a document of which, under section 17 of Indian Registration Act, registration was compulsory. The fact that the Revenue Court ordered mutation in accordance with the terms of the compromise did not render its registration unnecessary. The principle why orders and decrees of courts did not require registration was because they operated as *res judicata*; *Pravat Annā* v. *Lakshmi Annā* (1). Orders in mutation proceedings did not and could not affect questions relating to title. There was conflict of authority upon this point in this Court. Cases in favour of the appellant's contention are *Sadar-ud-din Ahmad* v *Chajju* (2); *Rustam Ali Khan* v. *Musammat Gaura* (3); *Bhawna* v. *Sikhdar* (4); *Deo Chand* v. *Pearay* (5). He also referred to *Raghubans Mani Singh* v. *Mahabir Singh* (6); *Kokta* v. *Peari Lal* (7); *Daya Shankar* v. *Hub Lal* (8)

Pandit *Kailas Nath Katju* (with The Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents :—

The court had made the decree under appeal under order XXIII, rule 3, of the Code of Civil Procedure. The plaintiff's case was that the suit had been adjusted out of court by a lawful agreement or compromise. The agreement alleged to have been arrived at between the parties was a settlement of doubtful rights in the nature of a family arrangement. It was passed on the assumption that there was "an antecedent title of some kind in the parties" and the

(1) (1892) I. L. R., 22 Mad., 508.
(2) (1908) I. L. R., 31 All., 13.
(3) (1911) I. L. R., 33 All., 728.
(4) (1914) 12 A. L. J., 993.
(5) (1914) 12 A. L. J., 1230.
(6) (1905) I. L. R., 28 All., 78.
(7) (1913) I. L. R., 35 All., 502.
(8) (1909) I. L. R., 37 All., 105.

1915

SITAL PRASAD v. LAL BAHADUR.

agreement acknowledged and defined what that title was; *Khwaja Lal* v *Govind Krishna Narain* (1). Such an agreement was neither a sale nor a gift nor an exchange, and therefore need not be in writing, and so long as it remained merely oral, it would not attract the provisions of section 17 of the Registration Act, which applied only to *instruments*. The petition presented by the parties in the Revenue Court was not itself the compromise, (though even as such it would be admissible in evidence), but only a piece of evidence of the terms of the pre-arranged oral compromise between the parties to adjust the civil suit. The parties thereby only intended to inform the Revenue Court of the terms of their agreement; *Nur Ali* v. *Imaman* (2). Moreover, the defendant did not deny the *factum* of the agreement, he wanted to avoid it by the plea of undue influence which had been negatived. The amended language of order XXIII, rule 3, of the Code of Civil Procedure made it quite clear that if one of the parties pleaded at the hearing a previous amicable adjustment of the suit out of court, the court was bound to inquire into the matter, and if satisfied that the suit had been adjusted by a lawful agreement, to pass a decree in the terms of the agreement.

Mr. *M. L. Agarwala*, in reply.

The petition in the Revenue Court was the final *form* of the so-called oral compromise, and under section 91 of the Evidence Act, no other evidence of its terms was admissible. It was in reality itself the compromise, and as it declared rights of the parties in immovable property it could not be looked at for want of registration.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which one Lala Lal Bahadur claimed a declaration of his title to certain property which originally belonged to three brothers, Raja Lal, Ambika Prasad and Munna Lal. The plaintiff's claim was that he was the daughter's son of one Bhawani Sahai, the paternal grand-father of the three persons we have named. It appears that while this suit was pending there was also pending in the Revenue Court proceedings for mutation of names. The application for mutation and the opposition thereto were

(1) (1911) I. L. R., 33 All., 353 (367). (2) Weekly Notes, 1884, p. 40.

1915

SITAL PRASAD v. LAL BAHADUR

based on exactly the same considerations as in the civil suit. On the 23rd of October, 1913, a petition was presented in the revenue matter signed by Lal Bahadur (plaintiff) and Sital Prasad (the contending defendant). This petition set forth that the revenue matter had been compromised in the manner set forth in the petition. The petition goes on to say that Lal Bahadur and Gobind Prasad had agreed to recognize Sital Prasad had a right to three-fourths of the property in dispute as against Lal Bahadur and Munna Lal. The Revenue Court acted on this petition and made entries accordingly. On the 21st of November, 1913, the plaintiff presented a petition to the learned Judge before whom the present suit was pending, stating that the suit had been compromised and asking that a decree should be made under order XXIII, rule 3, of the Code of Civil Procedure. He brought on to the file the petition of the 23rd of October, 1913, to which we have referred above. The defendant did not deny that he had joined in the petition, but said that he had done so as the result of fraud and undue influence. The court below held that there was no fraud or undue influence and made a decree in the terms of the alleged adjustment.

In the present appeal it is urged that the petition not being registered was inadmissible having regard to the provisions of section 17 of the Registration Act, XVI of 1908. The respondent contends that the petition to the Revenue Court was not a document that required registration and that it was admissible to prove that an adjustment of the civil suit had been made by the parties out of court and that, in the absence of fraud, it demonstrated that there had had been an adjustment. From time to time the admissibility of such petitions as evidence in subsequent proceedings in the Civil Courts has been raised, and there is undoubtedly some conflict of authority. Section 17 of the Registration Act, clause (*b*), provides that "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property, must be registered. It has been argued that these petitions are instruments requiring registration within the meaning of the section. In most, if not in all, of the cases heretofore decided in which the

1915

SITAL PERSAD v. LAL BAHADUR.

question has arisen the petition was presented to the Revenue Court long before the Civil Court proceedings were instituted. It may perhaps fairly be said that in some of these cases, the party producing the petition of compromise was attempting to use it for the purpose of showing that some right in immovable property had either been "created, declared, assigned, limited or extinguished." If, in the present case, the respondent was seeking to use the petition to show that a right in immovable property had been "created, declared, assigned, limited or extinguished," it might have been urged with great force that if the document "purported or operated" to do any one or more of these things, it was inadmissible for want of registration and that if it did not so "purport or operate" it was inadmissible as irrelevant. In the present case we think that the petition of the 23rd of October, 1913, was produced in the court below merely for the purpose of showing that this very suit had been adjusted by the parties out of court. This is clearly shown by the petition which the plaintiff filed in the Civil Court setting forth that there had been an adjustment. The petition of the 23rd of October does not on the face of it purport to "create, declare, assign, limit or extinguish any right." It was merely a request to the Revenue Court to effect mutation of names in accordance with an agreement come to between the parties. The petition does not on the face of it even purport to be the agreement between the parties. It is simply a "petition" addressed to the Court. Order XXIII, rule 3, provides that where it is proved *to the satisfaction of the court* that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the court shall order such compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. Prior to the passing of the present Code it had been the practice of this Court not to act under the corresponding section 375 of the old Code, unless the parties were actually agreed that an adjustment had been made when the court was asked to act. The other High Courts, on the contrary, had taken the view that it was open to one of the parties to prove the adjustment even when the other party denied it. The words of the present order seem to indicate that the Legislature has thought well to adopt the

1915

SHAM PRASAD v. LAL BAHADUR.

practice prevailing in the other courts and that the court must now inquire whether or not there has been an adjustment out of court. There was nothing to prevent the parties to the present suit coming to an oral agreement of adjustment. The only transactions relating to immovable property which require to be made in writing are those specified in the Transfer of Property Act. If the parties had presented to the Civil Court a petition in the same terms as that presented to the Revenue Court the Civil Court would undoubtedly have received it and acted upon it. We do not think that anyone could have contended that such a petition required registration. Suppose that both parties had signed such a petition and that on the strength of it the respondent had asked the court to act under order XXIII, rule 3: suppose further that the applicant had opposed the court's showing on the ground that he had been induced to sign the petition by fraud; and that the court had found that there was no fraud: we think it clear that the court would have been bound to make a decree in terms of the adjustment and that the applicant could not have successfully contended that the signed petition was inadmissible for want of registration. We think that the petition (which both parties signed) to the Revenue Court was in the circumstances of the case admissible as evidence that the present suit had been adjusted out of court. The significance to be attached to the evidence is of course another matter. In the present case when we consider that the mutation proceedings and the Civil Court suit were going on simultaneously and that it was exactly the same dispute it is clear that the present suit was adjusted. It is quite clear that the petition in the revenue matter was made in pursuance of the agreement to adjust the dispute pending between parties. In the natural course of events if Sital Prasad had kept good faith, he would have joined in a petition to the Civil Judge couched in exactly the same terms as the petition he had joined in to the Revenue Court. We think that the court below was justified in coming to the conclusion that the parties had adjust d the suit out of court, and that being so, it was the duty of the learned Judge to make the decree in terms of that adjustment. We see no reason to differ from the view taken by the court below on the question of undue influence and fraud, nor was

1915

SITAL PRASAD v. LAL BAHADUR

it seriously urged that we should do so. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1915 *November, 26.*

RAM SARUP AND OTHERS (DEFENDANTS) *v.* JASWANT RAI AND OTHERS (PLAINTIFFS).*

Act No IX of 1909 (Indian Limitation Act), section 12, schedule I, article 179—Limitation—Application for leave to appeal to His Majesty in Council—Exclusion of time requisite for obtaining a copy of the decree.

Held that section 12 of the Indian Limitation Act, 1909, applies to applications for leave to appeal to His Majesty in Council. The appellant is therefore entitled to exclude the days upon which the said judgment complained of was pronounced and the time requisite for obtaining a copy of the decree from the period of limitation prescribed.

THIS was an application for leave to appeal to His Majesty in Council against a decree of the High Court. A preliminary objection was taken that the application was beyond time, which resolved itself into the question whether the applicant was entitled to exclude from the period of limitation the time requisite for obtaining a copy of the decree from which the applicant sought leave to appeal.

Munshi *Gulzari Lal* and Pandit *Kailas Nath Katju*, for the appellants.

Munshi *Benode Behari*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This is an application for leave to appeal to His Majesty in Council. A point has been taken on behalf of the respondent that the application was not presented within time. Article 179 of the Limitation Act prescribes a period of limitation of six months from the date of the decree. Section 12, clause 2, of the Limitation Act now in force provides that in computing the period of limitation prescribed for an application "for leave to appeal" the day on which the judgement complained of was pronounced and the time requisite for obtaining a copy of the decree shall be excluded. It is admitted that if this provision applies to an application for leave to appeal to His Majesty in Council the application is within time. Prior to the passing of the present Limitation Act, appeals to His Majesty

* Privy Council Appeal No. 18 of 1915.

had to be brought within six months from the date of the decree and the applicant was not at liberty to exclude any time for the purpose of obtaining a copy of the decree. Under the old Act this time was only allowed to applications for leave to appeal as a pauper; but the clause of the section, as it now stands, is general and appears to apply to all applications for leave to appeal. It is highly probable that the words "leave to appeal as pauper" were omitted so as to include applications for leave to appeal in insolvency matters. But in construing the section we must deal with the section as it now stands. On the plain words of the section an applicant for leave to appeal is entitled to exclude the period referred to. In our opinion the application is within time.

1915

RAM SAHAY v. JAGNARAIN RAI.

The value of the subject-matter of the suit in the court below and of the proposed appeal to His Majesty in Council is upwards of Rs. 10,000. This Court did not affirm the decision of the court of first instance. The case accordingly fulfils the requirements of section 110 of the Code of Civil Procedure and we so certify. We make no order as to costs.

Application granted.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

HAR NARAIN AND ANOTHER (DEFENDANTS) v. BISHAMBHAR NATH AND ANOTHER (PLAINTIFFS).*

1915 November, 22

Hindu law—Mitakshara—Partition—Shares of sharers.

Under the Mitakshara law a step-mother is entitled, on a partition of the joint family property, to share equal to that of a son. *Muttayan Chetti v. Kadirvelu Kavundan* (1) distinguished. *Mahabir Pershad v. Rup Kuari* (2) followed.

This was a suit for partition of joint family property. The family consisted of the plaintiff, his half brother defendant No. 1 and his mother defendant No. 2. The only question material to this report which was raised in the case was whether the second defendant was entitled to a separate share equal to that of the sons, or whether she was only entitled to a half share of her own son's share, that is, whether the property ought to be divided into three shares or two. The court passed a decree in favour of the

* First Appeal No. 283 of 1913, from a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 24th of June, 1913.

(1) (1889) I. L. R., 16 Calc., 736. (2) Weekly Notes, 1890, p. 184.

1916

HAR NARAIN v. BISHAMBHAR NATH.

plaintiff dividing the property in three shares one of which was allotted to the mother of the plaintiff. The defendant objected to this part of the decree in appeal.

Munshi *Benode Behari*, for the appellants, submitted that the second defendant being a step-mother of the first defendant was not entitled to a share on partition. It was really giving the plaintiff two shares instead of one. The Mitakshara gave a share only to the mother; Mitakshara I, vii, CXXIII A. If a share was to be allotted to the mother of the plaintiff it should come out of the plaintiff's share. The Privy Council did that in *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (1).

Pandit *Shiam Krishna Dar*, for the respondent, argued that so far as the Benares School was concerned the step-mother was entitled to a share; *Mathura Prasad* v. *Deoku* (2). The Calcutta case was a case under the Bengal law; see *Chowdhry Thakur Prasad Shah* v. *Bhagbati Koer* (3).

He also discussed *Damodardas Manekla*l v. *Uttamram Manekla*l (4) and *Damodur Misser* v. *Senabutty Misrain* (5).

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal is connected with First Appeal No 355 of 1914. It is a suit for partition brought by Bishambhar Nath and Musammat Chiraunji against Har Narain and his son Anba Prasad. Bishambhar Nath is the brother of Har Narain. Musammat Chiraunji is the mother of Bishambhar Nath and step-mother of Har Narain. The only point which arises in the appeal is the share to which Musammat Chiraunji is entitled upon partition. The defendants contend that she is only entitled to a share out of the share allotted, on partition, to her son. On the other hand, the plaintiffs contend that the property must be divided into three parts, one part should be allotted to Bishambhar Nath, one part to Musammat Chiraunji and a third part to Har Narain. The court below has acceded to the contention of the plaintiffs. The defendants have appealed. Reliance was placed on the case of *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (1). This no doubt would be an authority in the appellant's favour if the present was not a case

(1) (1889) I. L. R., 16 Calc., 758.
(2) Weekly Notes, 1890, p. 124.
(3) (1905) 1 C. L. J., 142.
(4) (1892) I. L. R., 17 Bom., 271
(5) (1882) I. L. R., 8 Calc., 537

governed by the Benares School of Law (i.e. Mitakshara), but it is quite clear that the case cited was one under the Bengal School of law, namely, the Dayabhaga. This appears from the judgement in the case of *Chowdhry Thakur Prasad Sahi* v. *Bhagbati Koer* (1). On the other hand, there are several authorities in favour of the plaintiff which refer to the Mitakshara School of law, see *Damoodur Misser* v. *Senibutty Misrain* (2); *Damodardas Manekdal* v. *Uttamram Motichad* (3). The same point was expressly decided by this Court in the case of *Mathura Prasad* v. *Deoka* (4). In our opinion the view taken by the court below was correct and should be affirmed. We dismiss the appeal with costs.

1915

HAR NARAIN v. BISHAMBHAR NATH

Appeal dismissed.

1915 November, 29.

Before Mr. Justice Tudball and Mr. Justice Piggott.

RAM UGRAH PANDE AND OTHERS (PLAINTIFFS) v. ACHHAJ NATH PANDE AND OTHERS (DEFENDANTS) *

Civil Procedure Code (1908), *schedule II*, *clauses* 17 *and* [illegible] *4*, *application to file an award on reference made out of court—Proceedings in court continued—Limitation—Act No IX of* 1908 (*Indian Limitation Act*), *sections 5 and* 14, *schedule I*, *article* 178.

Pending proceedings for mutation of names the parties concerned referred to arbitration out of Court the whole question of their title to the property in dispute, and the arbitrator delivered his award. The mutation proceedings were nevertheless continued. More than six months after the date of the award, some of the parties filed an application in the Court of first instance purporting to be under clause 17 of the second schedule to the Code of Civil Procedure, and subsequently an amended application under clause 20.

Held that the application was not barred. Clause 17 of the second schedule to the Code of Civil Procedure was totally inapplicable, and neither section 5 nor section 14 of the Indian Limitation Act, 1908, could be applied in favour of the amended application under clause 20.

THE facts of the case sufficiently appear from the judgement of the Court and briefly stated, they are as follows:—

One Prag Dat Pande had five sons. On the death of Prag Dat Pande the whole of the property recorded in his name was

* First Appeal No 99 of 1915, from an order of Muhammad Ishak, Second Additional Subordinate Judge of Basti, dated the 23rd of February, 1915.

(1) (1905) I C. L. J., 142 (143). (3) (1882) I. L. R., 17 Bom., 271.

(2) (1882) I. L. R., 8 Calc., 537 (542). (4) Weekly Notes, 1899, p. 124

1915

RAM UGRAH PANDE v. ACHRAJ NATH PANDE

recorded in the name of one of his sons, Gokul Nath. Gokul Nath died leaving a widow, Musammat Dirka, and a daughter. On Gokul Nath's death the whole of the property recorded in his name was recorded in the name of Kedar Nath. During the time of Gokul Nath and Kedar Nath other properties were acquired in the names of different members. One of the sons of Prag Dat Pande *viz.*, Mukt Nath, died childless. Haus Nath, another son, died in 1910, leaving a widow, Musammat Sheopah, and five sons, *viz.*, Ram Ugrah and others. Sheomangal, the eldest son of Prag Dat Pande, died on the 30th of July, 1912, leaving three sons, *viz.*, Achraj Nath and others, and Kedar Nath died on the 31st of July, 1912. Disputes arose in the mutation department between the sons of Sheomangal, the sons of Haus Nath and Musammat Sonkali, widow of Kedar Nath. On the application of Achraj Nath and others, Musammat Sheopah and Musammat Dirka were also made parties. An agreement was executed between all the parties appointing one Rameshar Dat Man Tiwari as an arbitrator and agreeing to abide by his award. The agreement which was dated the 18th of November, 1912, was filed before the Tahsildar on the same day, but the Tahsildar did not send the case to the arbitrator and fixed a date for hearing. Some more mutation cases were pending in the court of the Deputy Collector. The parties executed another agreement in exactly the same terms on the 2nd of December, 1912, and filed it before the pargana officer, who was an Assistant Collector of the first class. The Assistant Collector sent the agreement to the Tahsildar directing him to forward the same to the arbitrator. The agreement with the records of cases was sent to the arbitrator by the Tahsildar. He, however, did not fix any time within which to deliver his award. The arbitrator wrote an award, dated the 8th of February, 1913, which reached the Tahsildar on the 13th of February, 1913. In the meantime the Tahsildar had proceeded with the hearing of the cases on the merits ignoring the award. On appeal the Collector set aside the order and directed the Assistant Collector to fix a date within which the arbitrator should give his award. The agreement was again sent to the arbitrator who wrote another award in exactly the same terms on the 28th of

1915

RAM PARTAB PANDE v. ACHHAI NATH PANDE.

May, 1913, and filed it before the Tahsildar. Mutation of names was ordered to be effected in accordance with the said award. Achhaj Nath and others took the matter in third appeal to the Board of Revenue, which set aside the orders of the Commissioner, Collector and Assistant Collector and held the award to be void on the ground that the Tahsildar had no power to refer the matter to arbitration. Thereupon Ram Partab and others, the sons of Hans Nath, applied to the Subordinate Judge of Basti under paragraph 17 of the second schedule to the Code of Civil Procedure praying *(a)* that the agreement be filed in court and the matter might be referred to the arbitrator and after the award was filed, a decree may be passed in terms of the award, and *(b)* in the alternative that if for any reason the agreement is not filed the award, dated the 8th of February, 1913, might be filed in court and a decree might be passed in accordance therewith. The Subordinate Judge dismissed the application. The applicant appealed to the High Court.

Munshi *Jang Bahadur Lal* (for Babu *Durga Charan Banerji*) for the appellants, submitted that, the Board having declared the award to be waste paper, the parties reverted to their original position, and the agreement being a general agreement and not for the purposes of the arbitration case, the court below was wrong in not ordering it to be filed. The award was a valid award, but as it followed an illegal reference therefore it was illegal. He relied on *Mathura Prasad* v. *Ganga Ram* (1).

Dr. *Surendra Nath Sen* (with him Pandit *Lekshmi Narain Tiwari*), for the respondents, submitted that the agreement was a valid agreement and it was followed by a valid award. The agreement had now lost its force, and the matter had now passed that stage. He further submitted that the prayer as to the filing of the award was barred by six months limitation under article 178 of the Limitation Act. Time could not be extended. Section 5 of the Limitation Act could not apply as it had not been made applicable by any enactment, to the provisions of the Code of Civil Procedure relating to arbitration, and section 14 of the

(1) (1908) 7 A. L. J., 69.

1915

RAM UGRAH PANDE v. ACHRAJ NATH PANDE.

Limitation Act did not apply because the Assistant Collector was an executive officer and not a Civil Court within the meaning of section 14 of the Limitation Act. He relied on *Muhammad Subhanullah* v. *The Secretary of State for India in Council* (1).

Munshi *Jang Bahadur Lal*, was heard in reply.

TUDBALL and PIGGOTT, JJ. :—This is an appeal arising out of an application made in the court below which was primarily based on clause 17 of the second schedule of the Code of Civil Procedure. While the matter was pending an application for amendment was made and an alternative relief was asked for under clause 20 of the same schedule. The lower court has refused both the reliefs. The first relief, which was claimed under clause 17, it rejected on the ground that an award had been made by the arbitrator on the basis of the agreement between the parties and that clause 17 could not apply, the matter having attained a stage beyond that contemplated by that clause. With regard to the relief claimed under clause 20, it rejected it on the ground that the application was barred by time under article 178 of the first schedule to the Limitation Act. The applicants have come here on appeal. The parties are the descendants of one Prag Dat Pande. The latter had five sons, one of whom died childless. All the others have now died. Shoomangal has left three sons who are parties to the present dispute. Hansraj has left five sons and a widow who are also parties to the present dispute. Kedar Nath left a widow Musammat Sonkali and three daughters, of these the former alone is a party to the dispute. Gokul Nath has left a widow Musammat Dirka and three daughters and the former only is a party to this dispute. It appears that the family was possessed of shares in a number of villages lying in the two tahsils of Basti and Khalilabad in the Basti district. Some of the villages stood in the names of some of the members, and others stood in the names of other members. After the death of Kedar Nath a dispute arose amongst the various branches as to their title. One branch alleged separation, the other branch alleged that the family still remained joint. An

(1) Weekly Notes, 1904, p. 64.

application for mutation of names was made in regard to each village. In the case of the Basti villages the applications were made in the regular way to the Tahsildar Assistant Collector. In the case of the Khalilabad villages the application appears to have been made in the court of the Assistant Collector who was in charge of the pargana. In the Basti cases the 18th of November, 1913, was fixed by the Tahsildar. In the Khalilabad cases the 2nd of December was fixed by the Pargana Officer. On the 18th of November, the parties executed an agreement to refer their dispute as to the title to the land to the arbitration of one Rameshwar Dat Man Tiwari. This agreement clearly sets out that the parties have a dispute as to their title to the family property, that they refer the dispute to the arbitrator, that they will abide by his decision, that they will take possession of their various shares according to his decision and that they will cause mutation of names to be made according thereto. Apparently the agreement was put before the Tahsildar and was filed on the record of the case before him. He adjourned the mutation case clearly with a view to enable the parties to settle their dispute by means of arbitration. He fixed a date directing them to settle that dispute but also laying down that if the disputes were not settled by the date so fixed then they were to be prepared to produce evidence in connection with the mutation case. On the 2nd of December, 1912, the date fixed by the Pargana Officer in the case before him, a similar agreement, written exactly in the same language and bearing the date 2nd of December, 1912, was filed before the Pargana Officer of Khalilabad. Under orders of the Collector the Pargana officer of Khalilabad was directed to decide both sets of cases, namely, the Basti and the Khalilabad cases. The Pargana Officer of Khalilabad sent all his files to the Tahsildar of Basti and told him to send the agreement to arbitrate to the arbitrator. This clearly was done, for on the 13th of February, 1913, the arbitrator filed an award bearing date the 8th of February, 1913. It appears that at a subsequent stage of the case he was directed to write out another award and that he did draw up an award worded exactly in the same language as the first one simply bearing a different date. One of the parties, the respondents to the present appeal, apparently

1915

RAM UGRAH PANDE v. ACHHAIBATH PANDE.

was not pleased with the decision of the arbitrator. The mutation cases were fought up to the Board of Revenue which finally sent back the records of the mutation cases with directions to try them *de novo* without any reference whatsoever to the arbitration proceedings. The present appellants then filed the present application, out of which this appeal has arisen, in the Civil Court. Primarily, as we have noted, it was an application under clause 17 of the Schedule asking that the agreement to arbitrate of the 18th of November, 1912, should be filed in court. Subsequently an alternative relief was prayed by the subsequent amendment asking that the award dated 8th of February, 1913, be filed in court and that a decree be passed based on the same. We have heard considerable argument as to whether the Tahsildar of Basti or the Pargana Officer of Khalilabad had or had not power to refer the matter to the arbitrator. We have not been shown any written application by the parties to either of those officers asking them to make the reference to the arbitrator. It is quite clear that the agreement of the 18th of November, 1912, was an agreement made entirely out of court. It is an agreement to refer to the arbitrator the disputed question of title, i.e., a question which the Revenue Court was not competent to decide in the cases then pending before it. It was not an agreement to refer the mutation case or cases to an arbitrator. It is an agreement on which the arbitrator, if the parties had referred the matter at once to him directly, would have been empowered to take the evidence of the parties and to make an award. It seems to us immaterial whether or not the Tahsildar or the Pargana Officer had not legal power as a Revenue Court to refer the agreement to the arbitrator. It is quite clear that the Tahsildar forwarded it to the latter with the full consent of the parties. If, therefore, there was any illegal reference under the Revenue Act it does not concern this present case. An agreement to arbitrate and a valid agreement was made out of court and by the wish of the parties it was sent on to the arbitrator by the Tahsildar, as indeed it might have been forwarded through any private person. It is an admitted fact that the arbitrator made an award. It is, therefore, quite clear that clause 17 of the second schedule of the Code of Civil Procedure cannot operate in the circumstances of

1915

RAM UDHAR PANDE v. ACHAL NATH PARUL.

the present case. The facts have gone beyond the stage contemplated by that clause. In regard to clause 20 of the schedule, in so far as the application is based thereon, the question is whether or not the application is barred by time. Admittedly article 178 of the first schedule to the Limitation Act applies and that lays down a period of six months from the date of the award. The present application was made more than a year after the date of the award. *Prima facie* it is therefore barred by limitation. A certain amount of stress has been laid on sections 5 and 14 of the Limitation Act. Section 5 clearly cannot apply. If the present proceedings be deemed to be based on an application and not to be a "*suit*," section 5 does not apply, as that only relates to an appeal or an application for review of judgement or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. No enactment or rule can be shown which would make this section applicable to an application of the present description. On the other hand, if the present matter be deemed to be a suit within the meaning of section 14, it is equally clear that the present appellants are not entitled to exclude the time during which they were prosecuting the mutation cases in the Revenue Court. The present application is an application to have an award filed and a decree passed on the basis of that award. The matter in controversy in the Revenue Court was not of this description. It was merely a mutation matter with a totally different cause of action as its basis. The present application is based upon the fact that there was an agreement to arbitrate and an award made up on that agreement. The two proceedings cannot be said to be founded on the same cause of action.

There remains the question, which we need not decide, as to whether the proceeding in the Revenue Court was a suit within the meaning of section 14, although on that point there is a ruling in *Muhammad Subhanullah* v. *The Secretary of State for India* (1), which is against the present appellants. It is therefore impossible for us either under section 5 or section 14 of the Limitation Act to extend the time so as to enable the present

(1) Weekly Notes, 1904, p. 94.

1915

RAM UGRAH PANDE v. ACHHAI NATH PANDE.

application to be treated as made within time. We note that the respondents plead before us in argument that both the agreement and the award were *prima facie* legal and binding, subject to any objection which could be raised on the ground of fraud or misconduct of the arbitrator, *etc.* The court below has found that both the agreement and the award were valid and that the present application was barred by time. With this we find ourselves in agreement. This result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1915

November, 26.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

ABID ALI (PLAINTIFF) v. IMAM ALI AND ANOTHER (DEFENDANTS).*

Mortgage—Contribution—Payment by co-mortgagor—Guardian and minor—Power of de facto guardian to mortgage minor's property—Muhammadan Law.

Held that where a joint mortgagor seeks contribution upon the ground that he has paid the whole mortgage debt and thus relieved the property of his co-mortgagor from a burden, it is not necessary for him to plead that he did so under compulsion.

Held also that the *de facto* guardian of a minor Muhammadan is competent, in case of necessity and for the benefit of the minor, to make a valid mortgage of the minor's property.

THE facts of this case were as follows:—

The plaintiff came into court on the allegation that he and the defendants had borrowed Rs. 3,000 on the 11th of April, 1908, from Dalel Khan and Sikandar Khan, and that he and defendant No. 1 and Musammat Shaffat Fatima as mother and guardian of defendant No. 2, who was then a minor, executed on the said date a simple mortgage-deed in favour of the said creditors, but as the rate of interest stipulated in the mortgage-deed was very high, the plaintiff alone paid the amount due on foot of the said mortgage to the creditors on the 1st of July, 1912. The plaintiff having paid the amount brought this suit for contribution against the defendants. The defendant No. 1 pleaded unsoundness of mind and the exercise of undue influence over him. The defendant No. 2 contended that the mortgage-deed had not been executed by his

* Second Appeal No. 1290 of 1914, from a decree of C. M. Collett, First Additional Judge of Aligarh, dated the 18th of May, 1914, reversing a decree of Shams-ud-din Khan, Additional Subordinate Judge of Aligarh, dated the 6th of January, 1913.

mother nor did she receive the consideration thereof, and that she was not legally entitled to transfer his property. The court of first instance dismissed the suit. On appeal by the plaintiff, the lower appellate court found as a fact that the execution of the deed and the receipt of consideration by the executants was proved and that defendant No. 1 had failed to substantiate the pleas as to unsoundness of mind and the exercise of undue influence. He accordingly decreed the suit for half of the amount claimed as against defendant No 1. As against defendant No. 2 he upheld the decree of the court of first instance, relying upon the Privy Council ruling in *Mata Din* v. *Ahmad Ali* (1) and on the question of the necessity for the loan he observed that although it did not seem that there was any ground for assuming that the money was not taken for necessity, it could not be said that plaintiff had clearly proved the existence of necessity. The plaintiff appealed and defendant No. 1 filed cross-objections.

Maulvi *Iqbal Ahmad* (with him Munshi *Gulzari Lal*) for the appellant :—

The mother of defendant No. 2 being his *de facto* guardian was competent to transfer his property for his benefit. *Majidan* v *Ram Narain* (2) and *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (3). In the Privy Council case referred to by the court below it was never decided that a *de facto* guardian is not competent to transfer a minor's property for his benefit. In that case it had been found that the transfer was not for the minor's benefit, and it was absolutely unnecessary to decide the question of law involved in this case. The District Judge never intended to find against the plaintiff on the question of necessity for the transfer. The meaning of his finding is that the plaintiff has proved that the money was taken for necessity, but that the plaintiff had failed to prove that fact clearly. He decided the case against the plaintiff on the question of law, but he never intended to find on the question of fact against the plaintiff. At any rate there is not such a clear and definite finding of fact against the plaintiff as would be binding on this Court.

(1) (1913) I. L. R., 34 All., 213. (2) (1903) I. L. R., 25 All., 32.

(3) (1906) I. L. R., 34 Calc., 65

1915

ABID ALI v. IMAM ALI.

Mr. *B. E. O'Conor*, for the respondent.

The finding of the lower appellate court on the question of necessity is clear and against the appellant. It lay upon the plaintiff to prove satisfactorily that the transfer was for the minor's benefit, and as he had failed to establish that fact, the suit was rightly dismissed as against defendant No. 2

Maulvi *Iqbal Ahmad*, was not heard in reply.

BANERJI, J.:—This appeal arises out of a suit for contribution brought by the plaintiff appellant against the defendants in respect of a mortgage, dated the 14th of April, 1908, alleged to have been executed in favour of Dalel Khan and Sikandar Khan by the parties to this suit. The plaintiff discharged the mortgage and he claims to recover from the defendants their rateable share of liability for the mortgage debt. The defendants denied the execution of the mortgage and the payment of consideration. It was further contended on behalf of Imam Ali that he was of unsound mind at the date of the mortgage, and that the mortgage, if at all made, had been obtained from him by undue influence. On behalf of Shahamat Ali, who is a minor, it was urged that his mother, who is said to have executed the mortgage as his guardian, was not competent to do so on his behalf, that there was no necessity for the mortgage, and that he did not benefit by it. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal the learned Judge came to the conclusion that Imam Ali was not of unsound mind at the date of the mortgage, that there was no undue influence, and that the execution of the mortgage was proved as well as the payment of consideration. The learned Judge decreed the claim against Imam Ali. As regards the minor defendant, he was of opinion that his mother, not being his legal guardian according to Muhammadan Law, was not competent to mortgage his property. He further proceeded to try the question of necessity, and on that point he observed that, although it did not seem that there was any ground for assuming that the money was not taken for necessity, it could not be said that the plaintiff had clearly proved the existence of necessity. He accordingly affirmed the decree of the first court as against the minor defendant. The plaintiff filed this appeal and objections have been preferred under order XLI, rule 22, on behalf of Imam

1916

ABID ALI v. IMAM ALI

Ali. We may deal with these objections first of all. It was urged that as the mortgage was not discharged under compulsion, the plaintiff could not maintain a suit for contribution. We do not agree with the contention. It is clear that if the plaintiff discharged the mortgage he relieved the property of the defendants from a burden which lay on it, and is, therefore, entitled to be compensated for what he paid for the defendants and for their benefit. It was also not necessary, in order to entitle him to contribution, that he should have been put into possession of the property of the defendants. As he relieved the defendants of a burden, whether under compulsion of law or as a private transaction, he is entitled to claim that the defendants, his co-mortgagors, should pay him what he has paid for their benefit.

It is next urged that the lower court did not come to a clear finding as to Imam Ali's state of mind at the date of the mortgage, and as to undue influence. We think that the finding of the learned Judge on the point is as clear as it could be. He was distinctly of opinion that at the date of the mortgage the defendant Imam Ali was not of unsound mind such as incapacitated him from understanding the nature of the transaction. He also clearly found that there was no undue influence. The objections put forward on behalf of the respondent Imam Ali must, therefore, fail.

As for the appeal, the first ground of the learned Judge's decision, namely, that the mother of the defendant had no power to make the mortgage, and that the mortgage could not be binding whether it was for necessity and for the benefit of the minor or not, cannot be supported in view of the decisions of this Court in *Majidan* v. *Ram Narain* (1), which followed the ruling in *Hasan Ali* v. *Mehdi Husain* (2). According to these rulings, if the mother of the minor defendant, who was his *de facto* guardian, made the mortgage for the benefit of the minor and for necessity, the mortgage would be binding on the minor. The learned Judge's finding on the question of necessity is not very clear and is open to doubt. It is, therefore, necessary to obtain from the court below a clear and distinct finding on the issue whether the debt in question was incurred by the mother of Shahamat Ali, minor, for valid necessity and for his benefit.

(1) (1916) I. L. R., 38 All., 22 (2) (1877) I. L. R., 1 All., 538.

1915

ABID ALI v. IMAM ALI

We refer this issue to the court below under order XLI, rule 25, of the Code of Civil Procedure. The court will decide the issue upon the evidence already on the record. On receipt of its finding the usual ten days will be allowed for filing objections.

WALSH, J.—I want to say a word or two about this case out of respect to the learned Judge of the lower court. It is quite clear that he followed the dictum which has been cited from the argument in the Privy Council, and did not recognize that the decisions of this Court, which were quoted to him, were binding upon him. Now it is quite true that, in spite of the decision to which he came upon the point of law, he would still have to dispose of the issue as to necessity, and if he had done so in any shape or form, however unsatisfactory on the face of it, I should have to accept it. To my mind it is perfectly clear that he came to no decision at all. I look at the decisions to which he did come. In clear unambiguous language he held that the execution of the deed was proved. In clear unambiguous language he held that the two issues of unsound mind and undue influence failed. In clear unambiguous language he held that the mother had no power to mortgage. I, therefore, find that out of five decisions to which he is alleged to have come he used clear unambiguous language in four. In the fifth he used language which under no circumstances can be called either clear or unambiguous. Mr. *O'Conor* sought to justify or rather to satisfy us that it was a finding of fact on two grounds. The first, as I understand him, is that it was a slipshod judgement; secondly, that there had already been a finding by the Subordinate Judge. To my mind both these points rather confirm the view which I took on a study of the language used by the District Judge. If it had been a slipshod judgement, one might possibly infer that he intended to come to some decision. But to my mind it is a very clear and well expressed judgement from the beginning to the end, and my view, therefore, is strengthened that he did not intend to come to any decision on this point. Secondly, the fact that he had a decision before him of the Subordinate Judge on this point rather strengthens my view that the tendency of his mind was not to agree with the Subordinate Judge. He could have said, on the merits as to necessity, that the Subordinate Judge had found that there was no necessity, and that he agreed with him.

1915

ASIN ALI v. IMAM ALI

So far from saying that, he dwelt upon the strength of the argument in favour of necessity, and he went on to say, "it does not seem that there is any ground for assuming that the money was not taken for necessity, though it cannot be said that plaintiff has clearly proved this." Under these circumstances it is impossible for me to come to the conclusion that the District Judge intended to find that there was no necessity.

Issue referred.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1917

November, 30

BANSGOPAL AND OTHERS (PLAINTIFFS) v. SHEO RAM SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Construction of document—Anomalous mortgage—Suit for foreclosure—Limitation—Act No. IX of 1908 (Indian Limitation Act), Schedule I, article 135—Regulation No. XVII of 1806.

A mortgage was made on the 25th of February, 1856, for a period of six years. It was provided that, if after six years anything remained due to the mortgagees, they might forthwith enter into possession of the mortgaged property and realise the principal and interest. It was further provided that the property would not be transferred so long as any principal and interest remained due; and that if it was transferred or if the money due to the mortgagee was not paid, the mortgagee, without waiting for the expiry of the six years, might bring a suit for recovery of the principal and interest, or he might also get possession "by completion of sale." Nothing at all was paid by the mortgagor on the way of either principal or interest, and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1806 were also taken by the mortgagee. In the year 1910 the representatives of the mortgagee instituted a suit for foreclosure.

Held, on a construction of the mortgage-deed in suit, that the cause of action accrued in 1867, and the suit was barred by limitation.

Kishori Mohun Roy v. *Ganga Babu Dobi* (1) distinguished. *Nemnath Das* v. *Khetter Mohun Singh* (2) followed. *Shyam Chunder Singh* v. *Hables* (3) and *Ram Dasan Roi* v. *Durga Roi* (4) referred to.

THIS was a suit for recovery of money and in default of payment by the defendants, for foreclosure of the mortgaged property.

The property in dispute, a village called Hazipur, was mortgaged by the predecessors in title of the defendants on the 25th of February, 1856, for a period of six years. It was provided by the

---

* First Appeal No. 449 of 1913, from a decree of Munshi Lal, Subordinate Judge of Gorakpore, dated the 1st of October, 1913.

(1) (1875) I. L. R., 23 Calc., 228 (3) (1912) 10 A. L. J., 522.

(2) (1889) I. L. R., 16 Calc., 698. (4) (1919) 49 A. L. J., 529.

1915

BANSIDHAR v. SHIB RAM SINGH

deed that the mortgagors were to remain in possession and pay the interest half-yearly. It was further provided that if the money was not paid within the stipulated period the mortgagee will be entitled to recover possession of the mortgaged property; and if the property was transferred by the mortgagor without payment of the mortgage money, the mortgagee would be entitled to foreclose the property. The property passed to the defendants after the mortgage. The present suit was brought by the mortgagees for foreclosure on the 2nd of July, 1913. The plaintiffs alleged that the cause of action arose in their favour in 1867, when a part of the property was sold in execution of a decree and also in 1904 and 1905 when the mortgagors transferred the rest of it to the defendants. The defendants, among other pleas, raised the defence of limitation. The court below dismissed the suit as barred by limitation. The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* (with him the Hon'ble Pandit *Moti Lal Nehru*), for the appellants:—

In 1866 when the mortgage in suit was executed Regulation XVII of 1806 was in force. Under that Regulation no suit for foreclosure could be instituted. A person wishing to foreclose had to apply to the District Judge to issue a notice to the mortgagor to pay and the latter would pay within one year of the notice. If no payment was made, a suit for possession could be instituted. If proceedings under the Regulation were not taken the mortgage kept alive. The object of the Regulation was to keep the mortgage in force and to prevent the property from being foreclosed until proceedings were taken under it. (He referred to section 7 of the Regulation.) It is thus clear that the present suit is not barred by limitation under the Regulation. In those days the tendency was not to cut short the period of limitation. No proceedings could be brought before the expiry of six years provided by the deed. The suit was not barred even under the Limitation Act of 1859. Assuming that twelve years limitation applied, the suit would not be barred up to 1878 when the Limitation Act XV of 1877 had come into force. The Act of 1877 gave 60 years limitation to a suit for redemption or foreclosure of a mortgage and that period began to run from the date the cause of action arose. In this case the cause of action arose in 1872 and

60 years have not yet expired. The suit was brought within the two years allowed by section 31 of the present Limitation Act. The cases relied upon by the court below do not apply. There the time had expired before the Act of 1877 came into force. He discussed the following cases:—*Imdad Husain* v. *Mannu Lal* (1), *Kubra Bibi* v. *Wajid Khan* (2), *Kishori Mohun Roy* v. *Ganga Baku Debi* (3) and *Srimati Surasibala* v. *Nundlal* (4). This is an anomalous mortgage. Two or more conditions could be combined as they have been in this case. Reference was also made to *Thumbusawmy Mudaliy* v. *Mahomed Hussain Rowther* (5).

Mr. *B. E. O'Conor* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents:—

The real question is whether the mortgage is one by conditional sale (*bai bilwafa*). In the deed there is no suggestion of sale. The essence of conditional sale is that it is a sale out-and-out of property, subject to a reconveyance. There must be an out-and-out transfer of title in a sale. The cause of action in this suit arose when the mortgage was executed; *Shyam Chandar Singh* v. *Baldeo* (6), *Ram Dawar Rai* v. *Bhirgu Rai* (7). Notice under the Regulation should have been given by the mortgagee within twelve years of the arising of the cause of action. It was not given. The question, therefore, arises whether not giving of notice would save limitation. It is submitted that once the cause of action arises limitation would go on running. The suit is, therefore, barred by limitation. *Srinath Das* v. *Khetter Mohun Singh* (8). *Karimbat Khan* v. *Mushapin Khan* (9), *Brojonath Kundoo Chowd'y* v. *Khelut Chunder Ghose* (10).

The Hon'ble Dr. *Sundar Lal*, in reply, cited *Aman Ali* v. *Asgar Ali Mia* (11).

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of suit for foreclosure of a mortgage said to have been made on the 25th of February, 1866. The principal sum alleged

(1) (1881) I. L. R., 3 All., 500.
(2) (1899) I. L. R., 16 All., 29.
(3) (1895) I. L. R., 23 Calc., 978.
(4) (1870) 5 B. L. R., 389.
(5) (1875) L. R., 2 I. A., 241.
(6) (1912) 10 A. L. J., 522.
(7) (1914) 30 A. L. J., 535.
(8) (1884) I. L. R., 10 Calc., 990.
(9) (1903) I. L. R., 26 All., 4.
(10) (1871) 14 Moo. I. A., 144.
(11) (1899) I. L. R., 27 Calc., 185.

1915

BANSGOPAL v. SHEO RAM SINGH

to have been secured was Rs. 3,000. The interest claimed is Rs. 16,000, in all Rs. 19,000. The suit was instituted in August, 1910, a few days before the expiration of the special period of grace allowed by section 31 of the Indian Limitation Act, 1908. This provision was passed to meet the supposed hardship occasioned by the decision of their Lordships of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). There can be very little doubt that this amendment led to the institution of many doubtful mortgage suits. It is not alleged that from the date of the mortgage to the institution of the suit any payment had ever been made upon foot of the principal or interest secured by the mortgage. The plaintiffs were unable even to produce the original mortgage deed, but no question on this point is before us in the present appeal. The claim is at best an exceedingly stale one. The court below has held the suit barred by limitation. The copy of the mortgage which has been allowed to be given in evidence, will be found at page 7 of the appellant's book in First Appeal No. 382 of 1911. The translation is not particularly accurate. It begins by a statement that the mortgagor has borrowed Rs. 3,000, and has mortgaged the property for six years under conditions specified therein. The first clause provides that interest on the Rs. 3,000, at the rate of one per cent. per mensem should be paid every year in the month of Baisakh for six years. It goes on to provide that the mortgagor is to remain in possession and to pay the Government revenue (Clause 3 deals with redemption). Clause 4 provides that the mortgagor may make payments on account of principal in the manner specified therein. Clause 5 provides that if after the expiry of the six years anything remains due to the mortgagees, the mortgagees may forthwith enter into possession of the mortgaged property and realize the principal and interest. Clause 6 provides that the property shall not be transferred so long as any part of the principal or interest remains unpaid, and that if it is transferred, or if the money due to the mortgagees is not paid, the latter, without waiting for the expiry of the six years, may bring a suit to recover principal and interest and may also get possession by "the operation of

(1) (1907) I. L. R., 30 Mad., 426.

sale." The translation "possession by foreclosure" is not strictly accurate. The more literal translation is that the mortgagee will get possession as that of a purchaser. It will be seen from the terms of this mortgage that the purchasers were to remain in possession until some one or more of the events mentioned in the deed occurred. This mortgage seems more like a "simple mortgage" within the definition of such a mortgage in section 58 of the Transfer of Property Act than a mortgage by conditional sale. Save for the words in clause 6, the mortgagor does not appear "ostensibly to sell" the mortgaged property, words which occur in the definition of a mortgage by conditional sale contained in the same section. The appellants contend that they were never entitled to get possession as "owners" of the property until they had taken proceedings under clause 8 of Regulation XVII of 1806; that they could not take any such proceedings until the expiration of six years from the date of the mortgage, that earliest possible time could not possibly begin to run against the mortgagor until the year 1872; that as the law stood at that time until that year 1872) they had twelve years within which they might institute a suit for possession or take proceedings for foreclosure, that Act XV of 1877, article 147, gave them a right to sue for foreclosure within sixty years of the time of the mortgage due, that on the passing of Act IV of 1882 (the Transfer of Property Act) proceedings under that Act for the redemption of the mortgage debts were substituted for the provisions of clause 8 of Regulation XVII of 1806, and that consequently their suit having been brought within the period prescribed in section 31 of Act IX of 1908, the suit was within time.

We must mention here that both the events mentioned in the mortgage, which would give the mortgagee a right to "possession as a purchaser," happened in the year 1867. Part of the mortgaged property was transferred in July, 1867, and, as already mentioned, there has never been any payment on foot of principal or interest. The appellants contend that this can make no difference, and rely upon the decision of their Lordships of the Privy Council in *Kishori Mohun Roy* v. *Ganga Bibee Bibi* (1). It is true in that case their Lordships held that "the stipulated

(1) (1895) I. L. R., 22 Calc., 224.

1915

BARKOTALI v. SHEO RAN SINGH.

period" mentioned in section 8 of the Regulation XVII of 1806 was the particular period mentioned in the deed, and that proceedings under that section could not be brought before the expiration of that period, even where there was a contract in the deed of mortgage making *without reference to redemption* the whole principal have become due upon failure to pay interest at a certain time. We need hardly mention that the terms of the mortgage in the present suit are wholly different. Under clause 6 the mortgagees were in the events which have happened entitled at once to bring a suit or get possession without waiting for the expiry of the stipulated period. Furthermore, the condition that the property could not be transferred was very different from a mere stipulation that the money should become due if default was made in the payment of interest. The transfer of part of the property prejudiced the security for the loan. We think that under the circumstances of this case we must hold that time began to run in July, 1867. Proceedings might then have been taken for possession in the Civil Court or for a foreclosure under the Regulation within twelve years.

In principle the circumstances of the present case seem to be undistinguishable from the case of *Srinath Das* v. *Khetter Mohun Singh* (1). In that case there was a mortgage, dated the 17th of November, 1865. Proceedings had been taken under the Regulation in the year 1873, but only the mortgagor was served with the prescribed notices. The contending defendants, who were purchasers from the mortgagor, had not been served. Their Lordships state at pages 703 and 704 of the report:

> "The inference which the court is bound to draw from the evidence, or omission of evidence, in the case, appears to be: That Ishan was fully aware of the foreclosure was as against Hari Narain perfect and effectual before the 31st of March, 1871; the notices were in all respects served which were required by the Regulation, they, therefore, contained the offer and by the proceedings and the *relationship of mortgagor and person entitled to redeem continued to exist* between Shaikh Sunder and them, the purchasers have continued in undisturbed possession since the time of their respective purchase, December, as has ever been paid on account of the interest payable, or any part of the principal has been paid in respect of any of the plots, the latest payment was made in August, 1872; therefore, if article 148 is the one applicable to the case, the twelve years had allowed run out in the month of August, 1884, at the latest."

(1) (1889) I. L. R., 16 Calc., 701.

Their Lordships were referring to article 135 of Act XV of 1877. That article provides that a suit by a mortgagee for possession of immovable property must be brought within twelve years from the time when the mortgagor's right to possession determines. The plaintiffs in the suit had been contending that article 147 of the same Act was applicable to the case. That article provides that a suit for foreclosure by a mortgagee might be brought within sixty years from the time when the money became due. It is quite clear that their Lordships held that article 135 was the article applicable. We think that the present appeal is concluded by this authority.

1915

RAMGOPAL v. SHIO RAM SINGH.

We may also refer to the cases of *Shyam Chander Singh* v. *Baldeo* (1) and *Ram Diwar Rai* v. *Bhirgu Rai* (2), where numerous rulings are referred to. We think that the cause of action accrued to the plaintiff in July, 1867, and consequently the present claim was barred within twelve years from the expiration of that date. We dismiss the appeal with costs.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

MAHABIR PRASAD AND ANOTHER (DEFENDANTS) v. MAHAT-ULLAH (PLAINTIFF).*

1915 *November*, 27.

Act No I of 1872 (Indian Evidence Act), section 94—Mortgage—Construction of document—Misdescription of property mortgaged—Evidence admissible to show to what property the mortgage was intended to apply.

On the 27th of March, 1854, one H B mortgaged 9½ biswas of the villages Anuda, Hasan Mahfud and Paniyala. On the 6th of February, 1873, the mortgagee executed a second mortgage of the villages comprised in the mortgage of the 27th of March, 1854, but by mistake the name of the third village was entered in the schedule of property mortgaged as Hulli Nagla instead of Paniyala.

Held that section 94 of the Indian Evidence Act, 1872, did not debar the mortgagees from giving evidence to show that the village of Paniyala was intended to be charged by the mortgage of the 6th of February, 1873, the language of the later mortgage could not be regarded as clear and unambiguous.

THE principal question arising in this case was one of the construction of a deed of mortgage, dated the 6th of February, 1873. One Haidar Bakhsh executed three mortgages, dated

* Second Appeal No 1224 of 1914, from a decree of C H Gatherman, Additional Judge of Moradabad, dated the 8th of April, 1914, modifying a decree of Mohsin Ali Khan, Munsif of Bijnor, dated the 29th of January, 1914.

(1) (1913) 10 A. L. J., 522. (2) (1912) 10 A. L. J., 538.

1915

MAHABIR PRASAD v. MASIAT-UL-LAH

respectively the 27th of March, 1864, the 3rd of April, 1864, and the 6th of February, 1873. The first was of 9¾ biswas of three villages Aunda, Hasan Mahdud and Paniyala; by the second another 5 biswas of Paniyala was mortgaged; and by the third, which was for Rs. 15,000, it was declared that Rs. 3,500 were to be a charge on the villages mortgaged by the bond of the 27th of March, 1864. In this third bond, however, the name of the third village was entered as Halla Nagla instead of Paniyala. The mortgaged property was sold in various portions to various purchasers in execution of money decrees against the mortgagor, and the purchasers of Paniyala then sued to redeem the mortgages of the 27th of March, 1864, and the 3rd of April, 1864, by payment of the proportionate amount to which that village was liable. The lower appellate court held that under section 94 of the Indian Evidence Act, 1872, evidence could not be admitted to show that in the mortgage of February, 1873, the entry of Halla Nagla was a mistake for Paniyala, and accordingly was of opinion that Paniyala was only chargeable under the two earlier bonds. The defendants mortgagees appealed to the High Court.

Mr. *M. L. Agarwala* and The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

Mr. *B. E. O'Conor* and The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

BANERJI and WALSH, JJ.:—This appeal arises out of a suit for redemption of a mortgage. The property sought to be redeemed is a share in the village Paniyala, which, along with other property, was mortgaged by one Haidar Bakhsh, who was the owner of it. He executed three mortgages, in one of which, dated the 27th of March, 1864, a 9¾ biswa share in Paniyala was mortgaged along with shares in two other villages. On the 3rd of April, 1864, he mortgaged five more biswas of the same village along with other property. On the 6th of February, 1873, he executed a mortgage for Rs. 15,000, and out of the consideration for that mortgage he declared that Rs. 3,500 was to be a further charge on the property comprised in the mortgage of the 27th of March, 1864. In the description of the property on which a further charge was thus placed, were mentioned a 9¾ biswa

1916

MAHADIK PRASAD v. MASHIT-UL-LAH

share in each of the villages of Anula, Hasan Mahdud and Halla Nagla; so that, instead of mentioning Paniyala under the mortgage of the 27th of March, 1864, which, together with the other two villages, was mortgaged, mention was made of Halla Nagla. The rights of the mortgagor in Paniyala have been sold by auction in execution of money decrees, and have been purchased by the plaintiff to the suit out of which this appeal arises, and by the plaintiff to the suit in the connected appeal No. 1225 of 1914. Portions of the mortgaged property have also been purchased by the defendants Nos. 1 and 2, who now represent the mortgagees. The integrity of the mortgages has thus been severed and the plaintiffs are entitled to redeem on payment of the proportionate liability of the property purchased by them for the mortgages which exist on it. The plaintiff's contention was that the village Paniyala was only liable under the two mortgages of the 27th of March, 1864, and the 3rd of April, 1864. The defendants mortgagees, however, urged that there was a further charge of Rs. 3,500 on that village under the mortgage of the 6th of February, 1873. The lower appellate court, in view of the provisions of section 94 of the Evidence Act, was of opinion that the defendants were not entitled to show that Paniyala was one of the villages on which a further charge of Rs. 3,500 was created, inasmuch as in the mortgage deed of the 6th of February, 1873, mention was made of Halla Nagla and not of Paniyala. It is clear from the terms of that document that the intention undoubtedly was to create a further charge on the property comprised in what was called the second mortgage, namely, that of the 27th of March, 1864. In that mortgage Paniyala was clearly included and not Halla Nagla. It also appears from the mortgage deed of the 6th of February, 1873, that where the mortgagor included in that mortgage property not included in the earlier mortgages, he distinctly said so. There is, therefore, no room for doubt that the intention was to create a further charge on Paniyala and not on Halla Nagla. Section 94 of the Evidence Act provides that "when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to shew that it was not meant to apply to such facts." We are of opinion that the language used in the

1915

MAHADIR PERSAD v. MAHAR-EE-LAL.

mortgage of the 6th of February, 1873, is not plain and unambiguous, as we have already pointed out. In the opening part of that document in which was made of the mortgage of the 27th of March, 1854, which created a charge on Paniyala. The document of 1873 clearly purports to place a further burden of Rs. 3,500 on the property comprised in the earlier mortgage of 1864, but apparently the scribe of the document made a mistake in mentioning Hathi Nagla as one of the properties included in the earlier mortgage of 1864, instead of Paniyala. This was clearly a misdescription, and the case is, in our opinion, one of misdescription and not real mistake. This being so, section 94 of the Evidence Act does not prohibit the appellant from showing what was intended to be included in the mortgage of 1873. In our judgement the plaintiff can redeem Paniyala by payment of the proportionate liability of that village, not only under the mortgages of the 27th of March, 1864, and the 3rd of April, 1864, but also under the mortgage of the 6th of February, 1873, for Rs. 3,500 out of the amount secured by that mortgage. As the amount for which Paniyala is rateably liable under these mortgages has not been ascertained by the Court below, we must refer an issue to that court to determine what is the amount of the proportionate liability of Paniyala. We accordingly refer the following issue to the court below under order XLI rule 25, of the Code of Civil Procedure :—

"What is the amount of the rateable liability of 14½ biswas of the village Paniyala and of the mortgages of the 27th of March, 1854, and of April, 1864, and the 6th of February, 1873?"

The court may take additional evidence, if necessary, and in arriving at its conclusion will bear in mind the observations made above. On receipt of the findings, the usual ten days will be allowed for filing objections.

Issue remitted.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

BARATI LAL (DEFENDANT) v. SALIK RAM (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), section 6—Agreement or claim to possession of property of deceased person—Such agreement or claim not to affect rights of reversionary heirs.

B claimed adversely to M the property left by M's deceased father. The claim was compromised, and B, for a consideration of Rs. 7,000 and some immovable property, withdrew his claim and recognized the title of M as absolute owner. M died, and the property passed to her heir F, who sold part of it to B.

Held, on suit by S to recover possession of the property so purchased, that the compromise by B of his claim against M was not obnoxious to the prohibition contained in section 6 of the Transfer of Property Act, 1882, as being a case of reversionary rights. *Mohammad Hashmat Ali v. Kunia Pattuni* (1) referred to.

THIS was a suit for possession of a house. The defendant appellant, Barati Lal, was the nephew of one Bhagga Lal and reversionary heir to his estate. The house in dispute belonged in equal shares to Mihin Lal and to Bhagga Lal. Mihin Lal was separate from Bhagga Lal and the latter died unmarried. Mihin Lal's property devolved upon Musammat Sharfo, who was the daughter of Mihin Lal's daughter's son. The plaintiff, Salik Ram, purchased half of the house from Musammat Sharfo. As regards the other half, the plaintiff's case was that Bhagga Lal was separate from the defendant and on his death he left him surviving Musammat Mohri Dei his widow, Musammat Sahodra, the widow of his predeceased son and Musammat Mohan Dei, his daughter. Upon his death Musammat Mohri Dei and Sahodra were recorded in respect of all his property. Musammat Sahodra survived Musammat Mohri Dei, and on her death Barati Lal made an application to the Revenue Court for mutation of names as heir to Musammat Sahodra. Musammat Mohan Dei contested the application, and as the result thereof the parties came to terms. A deed called "*dastbardari*" was executed on the 24th of February, 1911, whereby Barati Lal, stating himself to be the reversionary heir to Bhagga Lal, and Mohan Dei to be his daughter

* Second appeal No. 1234 of 1914, from a decree of Lala Brijnandan Lal, assistant Judge at Agra, dated the 21st of September, 1914, reversing a decree of Babu Peary Mohan Sanyal, Munsif of Agra, dated the 8th of January, 1914.

(1) (1916) I.L.R., 38 All.

1915

BARATI LAL v. SHAM RAM.

and owner of the property, stated as follows:—"*Yih ikrar karta hun ki jumla jaedad mutruka mamluka Lala Bhagga Lal maghuza se koi wasta aur tallug mera nahin hai aur Musammat Mohan Dei malik mutlaq jumla jaedad manqula wa ghair manqula kabiat zamindari waghaira, jiske Mahamin Musammat Mohan Dei wa Lala Khunni Lal . . . . . hain*" It was also provided that Musammat Mohan Dei and Lala Khunni Lal were entitled to transfer the properties in any way they liked. It was further stated that having received Rs. 5,000 in cash and some immovable property Bihari Lal was relinquishing all rights in the other property in favour of Mohan Dei and her husband Khunni Lal. In the end it was said that Barati Lal would get his application for entry of name then pending in the Revenue Court rejected and he would have the name of Mohan Dei recorded as against the zamindari property. After Mohan Dei's death Khunni Lal sold the remaining half of the house in dispute to the plaintiff on the 27th of July, 1913. The defendant Barati Lal himself had purchased from Khunni Lal some zamindari and shop[illegible] the 10th of April, 1912. The properties purchased by the defendant had also been acquired by Khunni Lal under the "*dastbardari*" of the 24th of May, 1911. The plaintiff's case was that about a month before the suit defendant had taken unlawful possession of the whole house and some movable property which plaintiff had in the house. The plaintiff had asked defendant to restore possession, and on refusal, he (plaintiff) commenced the present action. The defence, among other things, is that neither Musammat Shamo nor Khunni Lal had any proprietary right to the house, that defendant was the reversionary heir to Bhagga Lal's property and Mohan Dei had a Hindu widow's estate therein, and that the suit was time-barred. The court of first instance held that the plaintiff's purchase of half of the house from Musammat Shamo was valid and decreed the suit to that extent. As regards the other moiety it was held that the "*dastbardari*" of the 24th of May, 1911 was in the nature of a transfer of reversionary rights and read section 6 *(a)* of the Transfer of Property Act such a transfer was invalid. Consequently neither Mohan Dei nor Khunni Lal had acquired any interest in that portion of the house which the plaintiff could

1916

BALAKI LAL v. SHEO RAM

validly buy. The suit was accordingly dismissed in respect of that portion. Both parties appealed to the District Judge. He dismissed the appeal by the defendant. In regard to the appeal by the plaintiff he held that the defendant was estopped from denying the plaintiff's title and that the "*dastbardari*" was a "family arrangement" which was binding on the defendant. He accordingly reversed the decree of the court of first instance. The defendant appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant :—

The lower appellate court is wrong in holding that the "*dastbardari*" was in the nature of a family arrangement. The document does not purport to settle any *doubtful rights*. The parties knew what their rights were, and what the document really purports to effect is that the defendant for consideration parted with his reversionary rights which, according to law, he cannot do. Section 6 *(a)* of the Transfer of Property Act, and the cases of *Sham Sundar Lal* v. *Achhan Kunwar* (1), *Nund Kishore Lal* v *Kanee Ram Tewary* (2) and *Hargovan Nagan* v. *Braj Nath Das* (3) were also referred to. As to the question of estoppel the lower appellate court did not find that the defendant made any representation to the plaintiff whereby he was misled into acting as he did. Plaintiff might be expected to have read the "*dastbardari*" and he ought to have read it. The "*dastbardari*" was invalid, and the mere fact that the defendant prior to the plaintiff's purchase had himself acquired property from Khanni Lal was not a representation to the plaintiff which would estop the defendant. The case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (4) was also referred.

The Hon'ble Munshi *Gokul Prasad* (with him Babu *Sarat Chandra Chaudhri*), for the respondent :—

The question of estoppel does not arise, for the "*dastbardari*" is clearly in the nature of a family arrangement. It appears from the document itself that after the death of Sahodra, the defendant filed an application in the Revenue Court to get his name entered in respect of the property of Bhagga Lal as heir of Sahodra. He was opposed by Mohan Dei, and her

(1) (1898) I. L. R., 21 All., 71 (80).
(2) (1902) I. L. R., 29 Calc., 305.
(3) (1902) I. L. R., 24 All., 66.
(4) (1892) I. L. R., 20 Calc., 296.

1918

BARATI LAL v. SATGU RAM.

husband. There was thus a dispute in which each party put forward his respective right. Defendants claimed to be the owner and not a reversioner. In this condition of things the "*istifanama*" was executed; and it is submitted that it is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is." He referred to *Khanni Lal v. Gobind Krishan Narain* (1). The "*dastbardar*" affects no one. Defendant merely agrees for consideration not to claim the property in the event of his becoming entitled thereto after the death of Mohan Dei. There is nothing illegal in such a transaction and it is not in any sense a transfer; *Mohammad Hasan and Ali v. Bihari Lal* (2).

The Hon'ble Dr. *Tej Bahadur Sapru* replied.

BANERJI and WALSH, *JJ.*:—This appeal arises out of a suit in which the plaintiff respondent claims possession of a house purchased by him from two persons, namely, Mussammat Shamo and Khanni Lal. He purchased half the house from Mussammat Shamo and the other half from Khanni Lal on different dates. There is no dispute in this appeal in respect of the half share purchased from Mussammat Shamo. As regards the half share purchased from Khanni Lal the facts are these: The share in question belonged to Bhagga Lal and after his death was apparently in the possession of his daughter-in-law, the widow of a predeceased son. Upon her death the appellant Barati Lal made an application in the Revenue Court for the entry of his name as the heir of Bhagga Lal and the owner of his property. This application was resisted by Mussammat Mohan Dei, the daughter of Bhagga Lal, who asserted that her father was separate and that she was entitled to succeed to the property. The dispute resulted in the execution of a document on the 24th of May, 1911, by Barati Lal, which purported to be a deed of relinquishment. By that document Barati Lal, for a consideration of Rs. 5,000 and on receipt of certain immovable property, abandoned all his claim to the estate of Bhagga Lal and recognized the title of Mussammat Mohan Dei as absolute owner. Mussammat Mohan Dei being dead, the property passed to her husband Khanni Lal, who sold it to the plaintiff. Barati Lal's contention was that the transaction

(1) (1911) I. L. R., 33 All., 368. (2) (1915) 13 A. L. J., 110.

of the 24th of May, 1911, was a sale by him of his reversionary rights and was therefore invalid under the provisions of section 6 of the Transfer of Property Act. This contention found favour in the court of first instance, but was overruled by the lower appellate court, which decreed the claim of the plaintiff. In our opinion the decision of the lower appellate court is correct. The learned judge held that the transaction of the 24th of May, 1911, was in fact and substance a settlement of disputed claims. We agree with this view. There was a claim put forward by Parati Lal to the property of Phaggi Lal as the person entitled to it upon the death of Phaggi Lal's daughter-in-law. That claim was denied by Mussamat Molan Doi. One party appreciated the other and upon receipt of consideration from Mussamat Molan Doi, Parati Lal abandoned his claim to the property. This was not a mere transfer of reversionary rights within the meaning of section 6 of the Transfer of Property Act. The case is very similar to that of *Mohammad Hashmat Ali v. Kaniz Fatima* (1). In this view the appeal must fail and it is unnecessary to consider the question of estoppel which was argued with great ability on behalf of the appellant. We dismiss the appeal with costs.

Appeal dismissed.

1915

RAMAN LAL v. PARTI RAM.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1915

December, 2.

JADUBANSI KUNWAR AND OTHERS (PLAINTIFFS) v. RAI PAL SINGH AND ETHERS (DEFENDANTS).*

Hindu law—Daughter's estate—Suit by daughter for possession of her father's property—Death of plaintiff—Suit by natural grandchildren to continue the litigation.

A deceased Hindu died leaving a widow and four daughters, three married and one unmarried. After the death of her mother, the unmarried daughter sued to recover possession of her father's estate against her three married sisters *pro formâ* defendants. The plaintiff, however, died during the pendency of the suit. The three married daughters were then on their application transferred from the array of defendants to that of plaintiffs. Nevertheless the suit was dismissed upon the ground that it had abated by reason of the death of the original plaintiff.

Held that the suit should not have been dismissed. The original plaintiff represented the estate, and her sisters were entitled to continue the litigation

* First Appeal No. 109 of 1914, from a decree of Maulvi Hasan, Subordinate Judge of Ghazipur, dated the 20th of December, 1913.

(1) (1915) 13 A. L. J., 210.

1916

JADUBANSI KUNWAR v. MARPAL SINGH.

which she had commenced. *Mahadeo Singh* v. *Sheo Karan Singh* (1) and *Venkata Narayana Pillai* v. *Subbamma* (2) referred to. *Bateh Pari* v. *Durga* (3) not followed.

THE facts of this case were as follows :—

The suit was one for possession of immovable property. The property originally belonged to one Rampal Singh. He was succeeded by his widow, Musammat Zamira. Rampal Singh left four daughters, Musammat Raghubansi Kunwar, Musammat Jadubansi Kunwar, Shyam Rani Kunwar and Baburia Brij Raj Kunwar. The present suit was instituted by Baburia Brij Raj Kunwar. She alleged herself to be entitled to the property upon the death of her mother, to the exclusion of her sisters, because she was unmarried whilst the others were married. She made her sisters *pro formâ* defendants. Whilst the suit was pending she died and thereupon an application was made by the surviving sisters that their names should be changed from the array of defendants to that of plaintiffs. The application was granted, apparently without any opposition on the part of the defendants. The evidence was taken, but on the case coming up for decision it was contended by the defendants that on the death of the original plaintiff the suit abated inasmuch as the right to sue did not survive to the substituted plaintiffs. The court below, without going into the merits of the case, made a decree in which it was stated :—"It is ordered and decreed that it is declared that Musammat Brij Raj Kunwar being dead, the suit has abated." The plaintiffs appealed to the High Court.

Munshi *Lakshmi Narain*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, Nawab *Abdul Majid* and Mr. *M. L. Agarwala*, for the respondents.

RICHARDS, C.J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit for possession of immovable property. The property originally belonged to one Rampal Singh. He was succeeded by his widow, Musammat Zamira. Rampal left four daughters, Musammat Raghubansi Kunwar, Musammat Jadubansi Kunwar, Shyam Rani Kunwar and Baburia Brij Raj Kunwar. The present suit was instituted by Baburia Brij Raj Kunwar. She alleged herself to be entitled to the property upon the

(1) (1913) I. L. R., 35 All., 491 (2) (1915) I. L. R., 38 Mad., 405.
(3) (1907) I. L. R., 30 All., 49.

1915

JADUBANSI KUNWAR v. MAHAL SINGH.

death of her mother, to the exclusion of her sisters, because she was unmarried whilst the others were married. She made her sisters *pro formâ* defendants. Whilst the suit was pending she died, and thereupon an application was made by the surviving sisters that their names should be changed from the array of defendants to that of plaintiffs. The application was granted, apparently without any opposition on the part of the defendants. The evidence was taken, but on the case coming up for decision it was contended by the defendants that on the death of the original plaintiff the suit abated inasmuch as the right to sue did not survive to the substituted plaintiffs. The court below, without going into the merits of the case, made a decree in which it was stated:—"It is ordered and decreed that it is declared that Musammat Brij Raj Kunwar being dead, the suit has abated." The plaintiffs have appealed.

A preliminary objection is taken by the respondents that no appeal lies. It is contended that the decree or order, whichever it is called, is not a "decree" within the meaning of section 2, clause (2) of the Code of Civil Procedure and that, no appeal being directly given by the Code, no appeal lies. It seems to us very doubtful whether under the circumstances of the present case the order of the court below is not a "decree" within the meaning of section 2, clause (2). After the death of the original plaintiff, so far from the suit having been declared to have "abated" new plaintiffs were brought on the record, and a formal decree has in fact been drawn up in the very words in states that "it is ordered and decreed." If on the death of the original plaintiff the defendants had asked the court to declare the suit abated, and if it had done so, and if on the application of appellants the court had refused to set aside the abatement on the ground that right to sue did not survive, an appeal would have lain against such order. It is unnecessary, however, to decide whether the present appeal lies as such, because in our opinion the circumstances of the present case demand that if necessary we should treat the present appeal as an application in revision.

We now come to the merits of the case. If the original plaintiff's allegations be true she was entitled to possession of the property claimed for a Hindu woman's estate. On her death her

1915

JAGGESHWAR KUNWAR v. MARPAL SINGH.

married sisters (surviving her) would take jointly. It is contended on behalf of the respondents that the claim of the original plaintiff was one personal to her; that her sisters would not take as her heirs but as the persons entitled next after her, and therefore they can in no way be said to be her "legal representatives" under section 2, clause (11). The respondents rely on the case of *Bolakpuri* v. *Durga* (1). In that case an unmarried daughter claimed to redeem a mortgage on her father's property making her surviving married sister and the minor children of another deceased sister defendants to the suit. During the pendency of the suit the plaintiff died. On the application of the married sister and the children of the deceased sister to be brought on the record as plaintiffs, it was held that the claim of the original plaintiff being personal to her, the suit abated and the surviving sister could not carry on the litigation. The other side relies on the recent case of *Mahadeo Singh* v. *Sheo Karan Singh* (2). In that case a daughter obtained a decree for possession of her father's estate against two persons. Before she got possession she died and her sons applied for execution. The argument was that the sons did not take as heirs of the mother, but as reversioners to their grandfather's, and that accordingly they were not entitled to execute the decree obtained by their mother. It was held that the suit by their mother must be deemed to be a suit by a Hindu woman representing the estate, and that accordingly her sons, who were reversioners, were entitled to execute the decree. In the very recent case of *Venkata Narayana Pillai* v. *Subbammal* (3), the question arose whether on the death of a reversioner who had brought a suit for a declaration that an adoption was illegal and invalid, the next reversioner could be substituted for him and carry on the litigation as plaintiff. Their Lordships hold that he could be so substituted. At page 413 their Lordships say:—"Subsection (11) was embodied in Act V of 1908 with the object of putting in statutory language the result of the decisions of the Indian tribunals on the meaning of the words 'legal representative'"; but it is not clearly worded, and has already been the subject of criticism by at least one of the High Courts in

(1) (1907) I. L. R., 30 All., 42. (2) (1917) I. L. R., 39 All., 481.
(3) (1915) I. L. R., 38 Mad., 406.

India. The phraseology of sub-section (1), in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner.

1915

JAGDHARNI KUNWAR v. MAHPAL SINGH.

It is true that their Lordships go on to say that the case could be decided on another ground. It is, however, an expression of opinion by their Lordships that even a reversioner can represent the estate. If a reversioner can represent the estate there seems to be much stronger reason for holding that a Hindu woman in possession of the estate as such represents the estate. It has been held over and over again that in bona fide litigation the widow does so represent the estate and that reversioners are bound by the result of the litigation. If reversioners are bound by the result of the litigation on the principle of *res judicata* there seems very little reason why the persons who succeed one after another to the estate should not be entitled on succession to continue the litigation commenced by their predecessors. We think that the decision of the court below was not correct, and we accordingly allow the appeal, set aside the decree (or order) of the court below and remand the case with directions to readmit the suit upon its original number and to proceed to hear and determine the same according to law. Costs will abide the result.

Appeal decreed.

Before Justice Sir George Knox and Mr. Justice Walsh.

1915 *December 7.*

RAM NARAIN (DEFENDANT) *v.* JIVAN NATH PRASAD (PLAINTIFF) AND GANGA PRASAD AND OTHERS (INTERVENERS).*

Act (Local) No. III of 1901 (Oudh Land Revenue Act), sections 110, 111 *and* 112—*Revenue—question of proprietary title.*

One of the co-sharers in a village appealed to a Court of Revenue for partition, whereupon another of the co-sharers raised the objection that the village was an undivided property and could not again be divided.

Held that this objection raised a question of proprietary title in respect of which the Court of Revenue had jurisdiction to refer the parties to the Civil Court.

IN this case Ram Narain, one of the co-sharers in a village, applied to the Revenue Court for the partition of his share.

* First Appeal No. 181 of 1914, from a decree of Shiva Prasad, Subordinate Judge of Bahraich, dated the 31st March, 1914.

1915

RAM NARAIN v. JAGAN NATH PRASAD.

Jagan Nath Prasad, one of the non-applicants, raised an objection to the proposed partition, to the effect that the village had already been privately partitioned; that a definite portion of it had been allotted to him as his share, and that that portion could not be partitioned again. The Revenue Court, under the provisions of section 112 of the United Provinces Land Revenue Act, 1901, directed Jagan Nath Prasad to bring a suit in the Civil Court to have the question of title raised by him determined. Thereupon the plaintiff brought the suit out of which this appeal arose and the prayer in his plaint was "that it may be declared that the plaintiff is, by virtue of the mutual partition, separately the owner in possession of an eight-anna share in mauza Gaganli according to the partition *chittis*, together with all the rights and interests in the cultivated and uncultivated lands, fruit bearing and timber trees and groves containing mango, mahua and other trees, which should not again be divided." The court below made a decree in his favour, holding that a partition was effected in 1880, but that it was only what is known as an imperfect partition. The applicant for partition appealed to the High Court.

Babu *Girdhari Lal Agarwala*, for the appellant.

Babu *Jogindra Nath Mukerji*, for the respondents.

BANERJI and WALSH, JJ.:—The plaintiff Jagan Nath is the son of one Sheo Dayal who had a brother named Mata Din. The defendants are the sons and grandsons of Mata Din. The appellant Ram Narain applied to the Revenue Court for a partition of his $\frac{1}{16}$th share in the village. Upon notice being issued to the recorded co-sharers, the plaintiff Jagan Nath raised an objection to the effect that the village had already been privately partitioned, that a definite portion of it had been allotted to his share and that that portion could not be partitioned again. He thus raised a question of proprietary title, and the Revenue Court was competent, under the provisions of section 112 of the Land Revenue Act, either to try the question itself or to refer the parties to the Civil Court. It elected to adopt the latter course, and directed the plaintiff to bring a suit in the Civil Court to have the question of title raised by him determined. Thereupon the plaintiff brought the suit out of which this appeal has arisen

1915

RAM NARAIN v. JAGAN NATH PRASAD.

and the prayer in his plaint is "that it may be declared that the plaintiff is, by virtue of the mutual partition, separately the owner in possession of an eight annas share in mauza Gaganli according to the partition *chittas*, together with all the rights and interests in the cultivated and uncultivated lands, fruit bearing and timber trees and groves containing mango, mahua and other trees, which should not again be divided". The court below has made a decree in his favour, holding that a partition was effected in 1880, but that it was only what is known as an imperfect partition. In this appeal the first contention raised is that the Revenue Court was not competent to refer the parties to the Civil Court and that the latter court had no jurisdiction to entertain the suit. We are of opinion that this contention has no force. As stated above, a question of proprietary title was raised, and the Revenue Court was fully competent to refer the parties to the Civil Court. As to the merits of the case, the evidence is overwhelming in favour of the finding of the learned Subordinate Judge. Partition *chittis* were prepared and the lands were divided, not as an arrangement for the distribution of profits but as a division of the lands in the village. The oral evidence is supported by the *dastur dehi*, which is printed on page 2 of the appellant's book. In our opinion the appeal is wholly without force. We accordingly dismiss it with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball and Mr. Justice Walsh.

1915

December, 9.

RAM SINGH (DEFENDANT) v. MUSAMMAT JUANI (PLAINTIFF).*

Hindu law—Succession—Lunacy. Effect as to the devolution of immovable property of lunacy of next heir—Suit to recover possession from daughters of lunatic—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 141.

A person is disqualified under the Hindu Law from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable. *Deo Kishen* v. *Beohi Pershad* (1) and *Tirkan Saini* v. *Mahammad Umar* (2) referred to. The daughter, therefore, of such person would derive no legal title through her father.

* Civil Miscellaneous, No. 324 of 1915.

(1) (1883) I.L.R., 5 All., 566. (2) (1906) I.L.R., 28 All., 247.

1915

RAM SINGH v. MUSAMMAT BUAKI.

The legitimate wife of a lunatic Hindu took possession during his lifetime of certain removable property which had belonged to his father and subsequently transferred part of it to her daughters and to the husband of one of them. She retained a portion herself, which after her death came into the possession of one of the daughters. *Held* that a suit to recover the property of which possession had been so obtained and held was governed by article 141 of the first schedule to the Indian Limitation Act, 1908. *Lingo v. Rora Baran Singh* (1) distinguished.

THIS was a reference by the Local Government under rule 17 of the Kumaun Rules, 1894. The facts of the case were as follows :—

One Lachman Singh, Subedar, acquired the property now in suit. He died some fifteen or sixteen years prior to the suit leaving an idiot son, Ram Singh Tiagi. Ram Singh had a wife, Musammat Tara. Ram Singh died subsequently to his father, leaving three daughters by his wife, Musammat Tara. He had what has been described as a *Pharit* wife, Musammat Yasoli, and by her a daughter, the plaintiff in the suit. After the death of Lachman Singh, Musammat Tara took possession of the estate, and prior to her death in the end of 1906 she made certain transfers of the property in favour of her three daughters and of the contesting defendant, the husband of her third daughter, Musammat Dabki. She retained a portion of the property, which, on her death in 1906, was taken by one of her daughters. The plaintiff instituted the suit on the allegation that she was the legitimate daughter of Ram Singh and as such entitled to a share in his estate on the death of his widow, Musammat Tara. Musammat Dabki having died prior to the suit, she claimed a one-third share in the property. It was pleaded in defence that her mother was not the lawful wife of Ram Singh, but only his mistress, and that, therefore, the plaintiff was not entitled to inherit at all. It was, further, pleaded that the suit was barred by limitation. The court of first instance dismissed the suit. The court of first appeal decreed it. The court of second appeal upheld the decision of the Deputy Commissioner, and the matter was referred to the High Court under the Rules with a request to favour the Government with its opinion on three points. The first point was whether, in view of the fact that the plaintiff's father was a lunatic, the plaintiff had any right to

(1) (1897) I.L.R., 20 All., 35.

1916

RAM SINGH v. MURADMAT BEGAM

maintain the suit. The second point was whether or not the Commissioner was right in holding that daughters of *dhanti* wives could succeed to their father's property in view of the general principle of the Hindu law and of the fact that no custom was set up in the plaint and none was proved. The third was whether the Commissioner was right in holding that article 141 of the Limitation Act, sch. dule I, applied to the suit in view of the fact that the suit was one for a declaration of title and for delivery of possession.

Pandit *Baldeo Ram Dave* for the petitioner, Ram Singh :

In order to exclude a person from inheritance under the Hindu law on the ground of bastardy it is not necessary that the bastardy should be congenital. This Court has expressly held that it is sufficient to exclude a person if he is insane at the time the inheritance falls in; *Deo Kishen* v. *Budh Prakash* (1) and *Terbeni Sahai* v. *Muhammad Umar* (2). The widow of a disqualified heir could not claim as widow to succeed to any property which her husband could not have inherited. The possession of Musammat Tara, which she obtained on the death of Lachman Singh, was, therefore, that of a trespasser, and she was, by reason of her title acquired by adverse possession, entitled to deal with the property as she liked. The plaintiff could not claim this property as heir to her father, who was excluded from inheritance. Further, she was found to be an illegitimate daughter and as such she was not entitled to inherit as against the legitimate daughter even if her father be deemed not to have been excluded from inheritance.

Mr. *A. H. C. Hamilton* was heard in reply.

TUDBALL and WATSON, JJ. :—This is a reference under Rule 17 of the Rules and Orders relating to the Kumaun Division, 1894. The facts of the case are as follows. One Lachman Singh, Subedar, acquired the property now in suit. He died some fifteen or sixteen years prior to the suit leaving an idiot son, Ram Singh Thapa. Ram Singh had a wife, Musammat Tara. Ram Singh died subsequently to his father, leaving three daughters by his wife, Musammat Tara. He had what has been described as a *dhanti* wife, Musammat Yasuli, and by her a daughter, the plaintiff in the suit. After the death of Lachman Singh,

(1) (1883) I. L. R., 5 All., 609. (2) (1903) I. L. R., 26 All., 247.

1915

RAM SINGH v. MUSAMMAT BHANI.

Musammat Tara took possession of the estate and prior to her death in the end of 1906 she made certain transfers of the property, in favour of her three daughters and of the contesting defendant, the husband of her third daughter, Musammat Debki. She retained a portion of the property, which on her death in 1906, was taken by one of her daughters. The plaintiff instituted the suit on the allegation that she was the legitimate daughter of Ram Singh and as such entitled to a share in his estate on the death of his widow, Musammat Tara. Musammat Debki having died prior to the suit, she claimed a one-third share in the property. It was pleaded in defence that her mother was not the lawful wife of Ram Singh but only his mistress, and that, therefore, the plaintiff was not entitled to inherit at all. It was further pleaded that the suit was barred by limitation. The court of first instance dismissed the suit. The court of first appeal decreed it. The court of second appeal upheld the decision of the Deputy Commissioner and the matter has now been referred to us under the Rules with a request to favour the Government with this Court's opinion on three points. The first point is whether, in view of the fact that the plaintiff's father was a lunatic, the plaintiff had any right to maintain the suit. The second point is whether or not the Commissioner was right in holding that daughters of *dhanti* wives could succeed to their father's property in view of the general principle of the Hindu law and of the fact that no custom was set up in the plaint and none was proved. The third is whether the Commissioner was right in holding that article 141 of the Limitation Act, schedule I, applied to the suit in view of the fact that the suit was one for a declaration of title and for delivery of possession with reference to the ruling cited in paragraph 6 of the letter of reference. The ruling mentioned is the case of *Francis Leyge* v. *Ram Baran Singh* (1).

The reply to the first question is simple. In *Deo Kishen* v. *Budh Prakash* (2), which was subsequently followed in *Tirbeni Sahai* v. *Muhammad Umar* (3), it was clearly held that a person is disqualified under Hindu law from succeeding to property, if

(1) (1897) I. L. R., 20 All., 35. (2) (1893) I. L. R., 5 All., 509.
(3) (1902) I. L. R., 28 All., 247.

he is insane when the succession opens, whether his insanity is curable or incurable. The facts found are that Ram Singh Thapa was insane when his father died and that the property was acquired by his father Lachman Singh. It was therefore clear that Ram Singh Thapa did not inherit the property and that the plaintiff as his daughter has no legal title to the estate which was left by Lachman Singh. In the case of the second question it is clear that under the general principle of Hindu law an illegitimate daughter could not succeed to her father's property as against a legitimate daughter by a lawful wife. The plaintiff came into court alleging herself to be the legitimate daughter. The point was found against her. She did not plead any special custom either in the family or caste under which she as an illegitimate daughter would be entitled to take her father's estate. There is no evidence to prove such a custom. It is therefore clear that the Commissioner's finding on the point is wrong. On the question of limitation it is also clear that the ruling mentioned in the letter of reference, namely, that of *Francis Legge* v. *Ram Baran Singh* (1), does not and cannot apply to the present suit. In that suit the plaintiff came into court alleging that he was in possession and that a slur had been cast upon his title and asked the court to declare both that he was the owner and possessor of the property. That suit was purely declaratory in its nature. The present suit is a suit for possession. On the face of the plaint it was a suit by a Hindu daughter for possession of her share in her father's estate on the death of the mother. Suits of this nature really fall within article 141 of the first schedule to the Limitation Act and time begins to run from the date of the mother's death. The Commissioner was therefore right in holding that this article applied to the suit as brought. We therefore answer the questions *(a)* and *(b)* in the letter of reference in the negative and question *(c)* in the affirmative. We consider that the plaintiff should be ordered to pay the costs of the contesting defendant in all courts. The costs of this Court will include the fee of Rs. 32 certified by the respondent's counsel.

Reference answered accordingly.

(1) (1907) I. L. R., 29 All., 86.

APPELLATE CIVIL.

1915 December, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

DUJAI (PLAINTIFF) v. SHAM LAL AND OTHERS (DEFENDANTS).*

Second appeal—Finality of fact—Benami transaction—Suit by husband on mortgage in name of wife—Wife impleaded as defendant—Pleading—Issue.

Held (1) that the question whether a person who sues on a mortgage not being the mortgagee named in the document, is or is not the true owner of the mortgage is a question of fact, and (2) that where a person so suing impleaded the nominal mortgagee (who was his wife) as a defendant and no objection was taken by her, there was a reasonable inference that the plaintiff's statement, that he was sole owner of the mortgage sued on, was as between himself and his wife, correct.

This was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows:—

"It is conceded on behalf of the appellants that this appeal must be dismissed as against the substituted respondent Shambhu Nath as the latter was not made a party to this appeal till more than six months after the death of his father, Sheobux Lal. In the circumstance a decree in appeal is passed as against the other respondents in respect of half of the house in question. The suit is based on a mortgage, dated 1st June 1905, executed by Mussammat Sumaria, the wife of a man called Dujai. Sumaria brought a suit on that for the sale of the property mortgaged, but she impleaded as defendant a step-sister of N. Nath, then deceased, who was not the heir of Nanku. The result was that, although that suit was decreed and the property was purchased by a man named Rangali, one of the appellants before me, Rangali took nothing by his purchase. Dujai brought the present suit on the mortgage, alleging that he was in reality a mortgagee, although the mortgage was made in favour of his wife, Sumaria. The lower appellate court having examined all the evidence and considering the previous litigation has come to the conclusion that Dujai has failed to establish that he was in reality the mortgagee of the house in question. On this finding the lower appellate court has dismissed the suit. In second appeal it is contended that the finding is not one which cannot be challenged in second appeal, for it is said it is in reality a question what inference should be drawn from certain facts which are proved and that a wrong inference has been drawn. I cannot accept this contention. Dujai had to prove that he was in reality the mortgagee. He gave no direct evidence of it, but he asked the court to infer from certain previous proceedings that he must have been the mortgagee. I agree with the lower appellate court that the proceedings in question do not necessarily lead to any such conclusion. I must accept the finding that Dujai has failed to make out his case. The appeal is dismissed with costs."

*Appeal No. 62 of 1913 under section 10 of the Letters Patent.

1915

DUBAI v. SHIVA LAL.

The plaintiff appealed.

Munshi *Kanhaiya Lal*, for the appellant.

Pandit *Benoy Kant Malaviya*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit on foot of a mortgage, dated November, 1900, executed by one Nanku in favour of one Musammat Sumaria. The mortgage purported to be a mortgage of the whole house. In the events which have happened it is admitted that Nanku had no right to mortgage more than half the house and the plaintiffs in no event were entitled to a decree for sale of more than the half of the house which belonged to Nanku.

The facts connected with the suit are somewhat complicated and are fully set forth in the judgment of the learned District Judge. The court of first instance dismissed the plaintiff's claim for sale of the whole house though from the judgement it is pretty clear that it only intended to give a decree for half. The lower appellate court dismissed the plaintiff's suit. An appeal was filed in this Court and a learned Judge dismissed the appeal.

It is only necessary for us to refer to so much of the facts as relate to the present Letters Patent appeal. As already stated, the mortgage was made in favour of one Musammat Sumaria. She is the wife of the appellant Dubai. Dubai when he instituted the present suit made a number of persons defendants as pro-forma parties in the capacity of co-sharers, and he also made his own wife Sumaria a party. He alleged in the plaint that the whole interest in the mortgage which had been made in her name was *benami* for the plaintiff Dubai. Musammat Sumaria did not contest the suit or deny the allegations contained in the plaint as to the position which she occupied in relation to the mortgage. We must now mention another matter. In the year 1913 Musammat Sumaria brought a suit on foot of this very same mortgage. Nanku was then dead, and she impleaded as legal representative of the mortgagor, one Musammat Murti. A decree was obtained and the property was put to sale and half of the house was purchased by the co-plaintiff, Kangali. When Kangali together with Sheokori Lal (the purchaser of the other half of the house) sued for possession his suit was defended upon the ground that the representative of the mortgagor was not Musammat Murti, and that

1915

DUJAJ
v.
SHAM LAL.

therefore, he acquired no title. It further appears that the purchase money which Kangali had paid was attached by a creditor of Dujaj on the allegation that Dujaj was the real mortgagee and that the purchase money of all the horse belonged to him. Dujaj attempted to defeat the claim of the attaching creditor by alleging that the mortgage belonged to his wife. This gentleman, however, was not believed and the attaching creditor succeeded in getting the money. This litigation rather shows that Dujaj was, as he alleges, the real mortgagee.

In the lower appellate court it was contended on behalf of the appellants (i.e. the defendants in the suit), or some of them, that Musammat Samaria was the owner of the mortgage and that as she was not a plaintiff the suit could not be maintained by Dujaj. The lower appellate court widely relying on the fact that Dujaj had sworn that the money attached on the former occasion was that of his wife, decided that he was not the owner and that therefore he could not maintain the suit. The learned Judge of this Court held that this was a finding of fact in hand which the Court could not go in second appeal.

It seems to us that the only person concerned to deny the truth of Dujaj's statement in the present litigation that he was the real mortgagee was his wife the defendant Samaria. If she had appeared and denied her husband's title, she might have confirmed him with his previous statement. She did not, however, put in an appearance at all.

It is argued in the present Letters Patent appeal on behalf of Dujaj that, he having made Samaria a defendant and she having set up no defence, Dujaj could give a good discharge to the defendants in the event of their redeeming the property and that if a decree was passed under the circumstances in favour of Dujaj, the Musammat could never sue again. It seems to us that the contention has force. If Dujaj, instead of making his wife a *pro forma* defendant with the allegation that she was merely a *benamidar* for him, had made her a co-plaintiff with exactly the same allegation, the question could not possibly arise. We may suppose another possible case to illustrate the point. A man brings a suit on foot of a mortgage adding a person to the array of defendants with the allegation that this person holds the mortgage as

1916

DUJAI
v.
SHAM LAL.

benamidar for him and that he has been made a defendant because he refuses to join as plaintiff. It can hardly be said in such a case, if the alleged *benamidar* wanted to defend the suit or to deny the allegation of the plaintiff, that a decree could not be made if the mortgage was duly proved and *prima facie* proof of the ownership was given. There seems to be distinction between this and making (as in the present case) the wife a *pro forma* defendant. We need hardly say the case would be very different if the defendants could have shown that Musammat Sundara could and have herself sued and that that was the reason for substituting Dujai as plaintiff.

The only point left undecided by the lower appellate court was the question whether or not Dujai and Kangali could maintain the present suit having regard to the litigation in 1906. The two persons under the circumstances of the present case were quite entitled to join as plaintiffs, their rights *inter se* being a question for themselves. Kangali had purchased the property in the previous suit and paid for it and Dujai had voluntarily joined him as plaintiff. The present suit could be maintained against all persons who were not made parties to the previous litigation and it is not alleged that any of the defendants in the present suit were defendants in the litigation of 1906, except Sheodat Lal, against whom no relief is now sought or can be given.

The result is that we allow the appeal, set aside the decrees of the learned Judge of this Court and also of the lower appellate court and restore the decree of the court of first instance, with this modification that the decree will be for sale of only the half of the house which belonged to Nanku. We make the usual mortgage decree and extend the time for six months from this date. The plaintiff appellant will have his costs in all courts proportionate to his success against Khedu Lal.

Appeal decreed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

1915
December, 10

LACHMI NARAIN PRASAD AND OTHERS (PLAINTIFFS) v. KISHAN KISHORE CHAND AND OTHERS (DEFENDANTS).*

Hindu Law—Joint family property—Sale by father during minority of son—Suit by son for cancellation of sale—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 126.

A Hindu who at the time had a minor son sold certain joint property in 1881. The sale was pre-empted and part of the property was subsequently transferred by one of the pre-emptors. The vendor's son attained majority in 1895. More than three years after 1895 three sons were born to him and in 1911 the father and the sons sued for cancellation of the sale deed of 1881.

Held, that the suit was barred by limitation, inasmuch as the fifth of the sons of the executants not become born in 1895. The property ceased to be joint family property on the subsequently born sons were not in a position to dispute it.

THE facts of the case were as follows:—

One Bishesher Prasad, father of the first plaintiff and grandfather of the other plaintiff, executed a sale deed on the 28th of April, 1881, in favour of one Jhagga Ram. Rai Debi Saran Lal and Sarnam Singh brought a suit for pre-emption and under a deed of compromise, which related to the amount of consideration, got a decree for possession. In execution of that decree they got possession of the property in 1883. At the time of the sale Bisheshar Prasad had a son, Lachmi Narain Prasad, who was a minor, having been born in 1877. No suit was ever brought by Lachmi Narain Prasad to have the sale cancelled or to obtain possession. Subsequently three sons were born to Lachmi Narain Prasad, in the years 1904, 1906 and 1909, respectively. The present suit was brought by Lachmi Narain Prasad and his three minor sons on the 12th of September, 1913, against the representatives of Rai Debi Saran Lal and Sarnam Singh for cancellation of the sale deed of the 28th of April, 1881, and for possession of the property. The material allegations in the plaint were as follows:—(1) The sale deed dated the 28th of April, 1881, was in reality altogether fictitious and without any consideration and was caused to be executed by Bishesher Prasad aforesaid after fraud and deception had been practised upon him. It was not binding upon Bishesher Prasad himself, nor can it be legally binding upon these plaintiffs; (2) during this interval, Rai Debi Saran Lal,

* First Appeal No. 161 of 1914, from a decree of Lal Gopal Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 7th of February, 1914.

father of the defendants Nos. 1 and 2, and Sarnam Singh instituted a pre-emption suit relating to the sale-deed, dated the 28th of April, 1881, and alleged in the plaint that the sale consideration was only Rs. 844 and not Rs. 1,625. When Hazari Sahu and Jhagga Ram saw that their fraudulent and fictitious proceedings would be disclosed, they colluded with Rai Debi Saran Lal and Sarnam Singh and compromised the suit, although Bishesher Prasad, father of plaintiff No. 1, had filed a defence and had not given his consent to the compromise; (3) the plaintiffs learnt of the fictitious and fraudulent proceedings taken in connection with the sale-deed of the 28th of April, 1881, on the 13th of September, 1910, when they were impleaded in the case of Meghnath Ghosh, bearing No. 579 of 1910, of the court of the city Munsif of Gorakhpur. Defendants Nos. 1, 2, 3 and 4 were also impleaded; (4) the sale-deed, dated the 28th of April, 1881, is altogether fictitious, fraudulent and without any consideration. If it is maintained, it will cause a great loss to the plaintiffs and be a source of disgrace to their family. For the ends of justice it should be cancelled. The defence, *inter alia*, was that the sons of Lachmi Narain Prasad not having been born at the time of the sale they are not competent to maintain the suit, and that the suit is barred by limitation. The court of first instance held that Lachmi Narain Prasad being incapable of giving his consent to the sale, the sale was invalid and could be impeached by after-born grandsons, i.e., the sons of Lachmi Narain Prasad. It further held that the suit was barred by limitation under article 126 of the Limitation Act and dismissed it. The plaintiffs appealed.

Munshi *Harnbans Sahai*, for the appellants:—

The court below was wrong in applying article 126 of the Limitation Act. The suit being for the cancellation of the deed of sale on the ground of fraud, the article applicable was article 95 of the Limitation Act, and time began to run from the date when the fraud became known to the plaintiffs. The plaintiffs specifically alleged the nature of the fraud practised by Hazari Sahu on Bishesher Prasad. The plaint said that they were in collusion with Hazari Sahu and Jhagga Ram, and, therefore, they entered into a compromise with them. The plaintiffs produced documentary evidence to substantiate their allegations of fraud, but the court

1915

LACHMI NARAIN PRASAD v. KISHORI KISHORE CHAND

returned all those documents and so the material questions had not been tried. He relied on Kerr on Fraud, page 1, where fraud is defined and also on Pollock's Law of Fraud, page 17. He further submitted that even if it be assumed that the suit of Lachmi Narain Prasad was barred under article 126, the suit of the other plaintiffs who were still minors was not barred and ought to be tried on merits, *Ramkishore Kedarnath* v. *Jamnaranjan Ramrachhpal* (1). The minor plaintiffs acquired a right by birth to impeach the sale, which was an invalid sale; *Tulshi Ram* v. *Baba* (2).

The Hon'ble Munshi *Gokul Prasad* (with him The Hon'ble Dr. *Sunder Lal* and Munshi *Jang Bahadur Lal*), for the respondents :—

The minor plaintiffs have got no right to question the validity of the sale-deed. At the time of the sale-deed Lachmi Narain Prasad was a minor and he could not give his consent, and so the sale-deed was invalid, unless supported by legal necessity. He, however, attained majority in the year 1895 and within three years of that date he could have impeached the sale. Article 126 of the old Limitation Act of 1877 applied to this case, and his remedy became barred in 1898. Section 28 of the Limitation Act provides that on the determination of the period of limitation for any suit the right to such property was extinguished. So in this case in 1898, the right of Lachmi Narain Prasad to this property was extinguished and the property ceased to be family property and the subsequent birth of sons to Lachmi Narain Prasad will not revive that right. There was another aspect of the case. The sale would have been valid from the very beginning if Lachmi Narain Prasad had given his consent or ratified it. As he did not bring a suit to impeach the sale within the time allowed, he should be deemed to have ratified the sale, and the sale became absolute and the property went out of the family, *Tulshi Ram* v. *Baba* (2). He relied on Mayne's Hindu Law, 8th edition, pages 460 and 461. As to the questions of fraud, general allegations of

(1) (1913) I. L. R., 40 Calc., 966. (2) (1911) I. L. R., 33 All., 654

1915

LACHMI NARAIN PRASAD v. KISHAN KISHORE CHAND.

fraud were not enough. *Ganga Narain Gupta* v. *Tarachurn Chowdhry* (1). Here plaint no foundation for a case of fraud was laid, and so the learned Subordinate Judge was justified in not trying that question. He also relied on order 6, rule 4, of the Code of Civil Procedure.

Munshi *Harikesu Sahai*, in reply, contended that so far as the minor plaintiffs were concerned the property still belonged to the family, and it never ceased to be family property. Section 28 of the Limitation Act had no application.

BANERJI and WALSH, JJ.: The appellants are suing in a suit for possession of certain immovable property and for cancellation of a sale-deed executed by the predecessor in title on the 28th of April, 1881. The property belongs to one Lachmi Narain Prasad and Gajadhar Prasad and Lachmi Narain Prasad, the first plaintiff, is the adopted son of the latter. The sale-deed was executed by Gajadhar Prasad in favour of one Jhagga Ram. A suit for pre-emption in respect of the sale was brought by Dein Saran and Sarnam Singh, who are now represented by the defendants of the first party, and they obtained a decree on the 27th of June, 1882. The defendants, second and third parties, are transferees from Sarnam Singh and his successors in interest. The plaintiffs, other than Lachmi Narain Prasad, are the sons of the latter and grandsons of Bishesar Prasad. They brought the present suit on the allegation that one Hazari Saha perpetrated a fraud on Bishesar Prasad, who was of weak intellect, and obtained from him, first a mortgage and then the sale-deed referred to above, that the sale was a fraudulent and collusive transaction, and that it was not binding on the plaintiffs. The court below has dismissed the suit on two grounds: First, that the claim is time-barred, and secondly, that there were no assignments of fraud in the plaint and a mere general allegation that the sale was fraudulent and collusive was not sufficient to disclose a cause of action. The plaintiffs have preferred this appeal. In our judgement, if the suit be deemed to be a suit to set aside an alienation of joint family property, it is clearly time-barred as against Lachmi Narain Prasad. Lachmi Narain Prasad was a minor at the date of the sale, but he attained majority in 1895. He could, therefore, have brought a suit to set aside the alienation

(1) (1886) I. L. R., 13 Calc., 598, 597.

1915

LACHMI NARAIN PRASAD v. KISHAN KISHORE GHAND.

and to recover the property till 1898. As he did not do so, his right became extinct and the property, so far as he was concerned, became the property of the purchasers and ceased to be joint family property. The other plaintiffs, his sons, were all born subsequently to that year. It is true that it has been held that if at the date of the alienation by a member of a joint Hindu family, there is some member of that family in existence who could have questioned the alienation and did not assent to it, other persons subsequently born were entitled to question the validity of the alienation, although they did not exist at the date of it. That was held in the case to which reference is made in the judgement of the court below, but the present case presents different features. The only person who could contest the alienation made by Beharilal Prasad was Lachmi Narain Prasad. His right to do so became extinct in 1898. If the alienation was invalid, he could have brought a suit to set it aside some time before the expiry of 1898, and he could have recovered possession of the property. As he did not do so, his right to dispute the alienation and to recover the property said came to an end in 1898 and the property ceased to be the property of the joint family and passed absolutely to the purchasers in that year. The minor plaintiffs who were born subsequently did not acquire any interest in the property, as it had, at the date of their birth, ceased to be joint ancestral property in which they might have acquired a right by birth. In this view the minor plaintiffs are not entitled to maintain the present suit, and the claim of Lachmi Narain Prasad, if we treat it as one to set aside the alienation, is time-barred. It is manifest that the plaintiffs felt this difficulty and they accordingly put forward their claim on the ground of fraud. It has been repeatedly held, and this is also provided in the Code of Civil Procedure, that in a suit brought on the ground of fraud the plaintiffs are bound to make clear and definite assignments of the alleged fraud. As pointed out by the court below, no such assignment was made in the plaint in this case. On these grounds we are of opinion that the suit was bound to fail and has been rightly dismissed. We accordingly dismiss the appeal with one set of costs to the respondents who have appeared in this appeal.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh

1915
December,

WASIU-Z-ZAMA KHAN (DEFENDANT) *v.* FAIMA BIBI (PLAINTIFF)*

Act No. X of 1873 (Civil Courts Act), sections 8, 9 and 10—Principal and agent—Agent holding power of attorney to conduct suit for principal—Power of agent to agree to suit being decided according to statement on oath of defendant.

A lady who was plaintiff in a suit gave to her husband a special power-of-attorney to conduct the case on her behalf as he should deem fit. He was authorized to compromise or withdraw the suit, to refer it to arbitration and to nominate arbitrators, and finally to appoint a pleader and that every step that he might take in the conduct of the case was to be considered as having been taken by her self.

Held, that the husband had power to refer the suit to arbitration under clauses 8, 9 and 10 of the Oaths Act, 1873. Sita ram Singh *v.* Mahabir Tiwari (1) discussed and distinguished from.

THE facts of this case were as follows:—

One Faiza Bibi brought a suit against the defendant-appellant Wasi-uz-zaman Khan pleading that the latter had widened a certain ditch which existed between two plots owned by the parties, at the expense of the plaintiff, that is, he had taken earth from his side of the ditch, and thus reduced the area of her plot and damaged her crops. The suit was contested by the defendant. For the proper conduct of the suit the plaintiff executed a special power-of-attorney in favour of her husband. She gave him full powers to conduct the case as he should deem fit, and in the deed she also set out that he had power to compromise the suit, to withdraw the suit, to refer the point in dispute to arbitration, to nominate and appoint arbitrators, and concluded by saying that every step that he might take in the conduct of the case was to be considered as having been taken by her herself. In the course of the suit the husband applied to the court that if the defendant would take his oath on the Koran and swear that no damage whatsoever had been done to the plaintiff or earth removed from her side of the ditch, the plaintiff would abide by that oath and the case should be decided accordingly. The defendant took the oath and he testified that he had not removed earth from the plaintiff's side of the ditch nor had in any way damaged her plot or crops. Thereupon the court of first instance dismissed the suit. The plaintiff appealed. The court below, relying on the decision

* First app. of No. 129 of 1915, from an order of Muhammad Husain, Officiating District Judge of Ghazipur, dated the 7th of June, 1915.

(1) (1890) I. L. R., 14 Bom., 456.

1915

WASI-UZ-ZAMAN KHAN v. FAIZA BIBI.

in *Sakharam Raoji* v. *Maruti Vithal* (1), and also on the ground that the power-of-attorney in favour of the husband did not authorize him to take the step he had taken allowed the appeal, set aside the decree of the first court and remanded the suit to that court for decision on the merits.

The defendant appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent.

TUDBALL, J.—This is an appeal from an order of remand and arises out of the following circumstances. The plaintiff respondent Faiza Bibi brought a suit against the defendant appellant Wasi-uzzaman Khan pleading that the latter had widened a certain ditch which existed between two plots owned by the parties, at the expense of the plaintiff, that is, he had taken earth from her side of the ditch, and thus reduced the area of her plot and damaged her trees. The suit was contested by the defendant. For the proper conduct of the suit the plaintiff executed a special power-of-attorney in favour of her husband. She gave him full powers to conduct the case as he should deem fit and in the deed she also set out that he had power to compromise the suit, to withdraw the suit, to refer the point in dispute to arbitration, to nominate and appoint arbitrators and concluded by saying that every step that he might take in the conduct of the case was to be considered as having been taken by her herself. In the course of the suit the husband stated to the court that if the defendant would take his oath on the *Koran* and swear that no damage whatsoever had been done to the plaintiff or earth removed from her side of the ditch, the plaintiff would abide by that oath and the case should be decided accordingly. The defendant took the oath and he testified that he had not removed earth from the plaintiff's side of the ditch nor in any way damaged her plot or trees. Thereupon the court of first instance dismissed the suit. The plaintiff appealed. The court below relying on the decision in *Sakharam Raoji* v. *Maruti Vithal* (1), and also on the ground that the power-of-attorney in favour of the husband did not authorize him to take the step he had taken, allowed the appeal, set aside the decree of the first court and remanded the suit to that court for decision on the

(1) (1890) I. L. R., 14 Bom., 455.

1915

WAHID-UZ-ZAMAN KHAN v. FAIZA BIBI.

merits. It is contended before us on behalf of the defendant appellant that the special power-of-attorney in favour of the plaintiff's husband gave him full power to take the step which he did take. It is urged that the decision mentioned above is not correct and should not be followed. It has been pointed out that in certain cases the guardian of a minor has been allowed to take the step contemplated by sections 8, 9 and 10 of Act X of 1873. The latter cases do not help us in any way. In so far as the special power-of-attorney in the present case is concerned, I have examined the terms of it carefully and find that the plaintiff gave very extensive powers to her husband, for instance, to abandon the suit as well as to compromise it. I have not the slightest doubt whatsoever that the intention of the lady had full power to take the step which he did take. Sections 8, 9 and 10 of Act X of 1873 clearly contemplate that the action mentioned therein can be taken by a party to a suit. In the Act itself there is no language which goes to show that the word "party" can be used only in its restricted sense and not in the wider one. The considerations which are to be found at page 134 of the ruling in I. L. R., 14 Bombay, are considerations which really apply to a person who takes the oath rather than to a person who makes the offer. I can see no good reason why a "duly" authorized agent of a party should not make the affidavit contemplated in section 9. In the present case I am satisfied that the plaintiff had full power to take this step in view of the language of the power-of-attorney on the record. In my opinion the decision of the first court is correct and the order of the court below should be set aside.

WALSH, J.—I agree. My only reason for desiring to say anything is that I think it important that people should understand the extent to which they are bound by the acts of persons whom they employ with general authority to do acts on their behalf, and that it is equally important that persons who deal with such agents should understand the extent of the authority given to the latter, and also because we are dissenting from the opinion of decision of two Judges of the High Court of Bombay, which is now of fifteen years' standing. That decision is one which I am unable to follow. Under such authority as was given in that case, which in

1915

WARI-UZ-ZAMAN KHAN v. FAIZA BIBI.

substance resembles the authority given in the present case, if indeed it is not stronger, the agent could do any act which he deemed proper for the purpose of the conduct of the suit. The acts of the agent are acts of the parties. Act X of 1873 enables a party to make the offer which was made in the case before us. That is a step in a suit which, however rare in its occurrence, may arise as an incident in a suit. I see no reason why an agent authorized to conduct a suit is not authorized to take the step provided by Act X of 1873. The reasons given by the Bombay High Court, as my learned brother has pointed out, appear to be directed to questions relating to the person who takes the oath and not to the person who makes the offer. It is for this reason that I feel less hesitation in differing from the Bombay High Court. In my opinion the offer made here is contemplated by and included in the authority given by the plaintiff to her husband, by whose acts in the suit the plaintiff is bound.

BY THE COURT.—The appeal is allowed. The order of the court below is set aside and the decree of the first court is restored with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

1915
December 8, 21.

Before Mr. Justice Tudball and Mr. Justice Walsh.

EMPEROR v. GOBIND SAHAI *

Criminal Procedure Code, section 369—Review of judgment—Power of High Court to review its orders on the criminal side—Rules of Court, chapter VII, rule 8—Finality of order.

Held, that the High Court has no power to review an order dismissing an application for revision made by an accused person. *In the matter of the petition of E. W. Gibbons* (1) and *Queen-Empress v. Durga Charan* (2) followed.

Nor so long as an order is not revised as required by chapter VII, rule 8, of the Rules of Court, it is not final, and it is open to the Judge who passed it to alter it. *Queen-Empress v. Nidhi Tewari* (3) and *Emperor v. Kallu* (4) followed.

THE fact of this case were as follows :—

The applicant Gobind Sahai was called upon by a Magistrate of the first class to show cause why he should not be bound over

* Criminal Revision No. 1136 of 1915.

(1) (1886) I. L. R., 14 Calc., 42.
(2) (1885) I. L. R., 7 All., 672.
(3) (1869) 3 L. R., 21 All., 177.
(4) (1904) I. L. R., 27 All., 92

to be of good behaviour. An order was passed against him and he was directed to furnish security. He appealed to the District Magistrate, but his appeal was dismissed. He then applied in revision to the High Court on the 26th of June, 1915. On the 2nd of July, 1915, Mr. Justice BANERJI sitting singly after hearing Counsel on his behalf passed an order rejecting the application. This order was signed by Mr. Justice BANERJI, but was not dated. On the 6th of September, 1915, the applicant presented an application to the learned Chief Justice on which the following order was passed:—"Lay before Mr. Justice BANERJI and let this matter be informed of the date fixed for hearing."

1915

EMPEROR v. GANGA SAHAI.

On the application being laid before Mr. Justice BANERJI he referred it to a Bench of two Judges on the question whether such an application would lie.

Babu *Satlanath Mukerji*, for the applicant.

According to section 369 of the Code of Criminal Procedure a High Court has power to review its own judgement. The wording of the section is clear and shows that the High Court only can review its own judgement though no other court can. It was the intention of the Legislature that no court should be allowed to review its own judgement when it would have said so in other terms and made no exception. Section 369 was originally introduced in the Criminal Procedure Code Bill of 1882 to prevent a Court when it has signed its judgement from having power to review the same, except as provided in section 395 "to correct accidental error." It will be observed that when the Bill was passed into law an exception was made in the case of High Courts, and this must have been done intentionally. The powers of the highest tribunal in the land should not be restricted in any way. Suppose a man has been convicted of murder and the conviction has been upheld by the High Court and then the murdered man turns up, what will happen to the accused if the court cannot revise its orders? Such cases are rare, but have occurred. If the only remedy is remission of the sentence by the Government, that is not the same thing as an acquittal. The accused will always have a conviction against him for an offence which he never committed. Section 464 of the Code of Criminal Procedure of 1872, paragraph 1, read:—"When a judgement or final order has

1915

EMPEROR v. GOBIND SAHAI.

been so signed it cannot be altered or reviewed by the court which gives such judgement or order." The alternation is suggestive and clearly indicates the intention of the Legislature. The cases *In the matter of the petition of F. W. Gibbons* (1) and *Queen-Empress* v. *Durya Charan* (2) are not good law. In any case in the present case the order to be reviewed was not sealed and as such it is not a complete order and such an order can certainly be reconsidered; *Emperor* v. *Kallu* (3), and *Queen-Empress* v *Lalit Tiwari* (4). The last line of the last cited ruling shows that a review of judgement is contemplated.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown:—

The ruling in 14 Calcutta is a Full Bench ruling and it and the Allahabad case have been followed for the last 30 years. There is no apparent reason why the law as laid down in those cases should now be altered. The rules of the High Court do not contemplate the sealing of an order which is written by the Judge himself. Only orders which are dictated require sealing.

TUDBALL and WALSH, JJ.:—The facts before us are as follows:—The applicant Gobind Sahai was called upon by a Magistrate of the first class to show cause why he should not be bound over to be of good behaviour. An order was passed against him and he was directed to furnish security. He appealed to the District Magistrate, but his appeal was dismissed. He then applied in revision to this Court on the 26th of June, 1915. On the 2nd of July, 1915, Mr. Justice BANERJI sitting singly, after hearing counsel on his behalf, passed an order rejecting the application. That order was signed by Mr. Justice BANERJI, but was not sealed. On the 6th of September, 1915, the applicant presented an application to the learned Chief Justice on which the following order was passed:—"Lay before Mr. Justice BANERJI and let this man be informed of the date fixed for hearing." On the 10th of November, 1915, Mr. Justice BANERJI passed an order referring the question to this Court as to whether or not an application for review can lie in the circumstances of the case. He appears to have been in doubt as to the exact nature of the

(1) (1886) I. L. R., 14 Calc., 42.
(2) (1885) I. L. R., 7 All., 672.
(3) (1904) I. L. R., 27 All., 93.
(4) (1869) I. L. R., 21 All., 177.

1915

EMPEROR v. GOBIND SAHAY.

application, as he remarks in the course of his order that "it is difficult to say whether this last application is a fresh one for revision or an application for review of judgement." He referred the case, however, to a Bench of two Judges with a view to a decision on the question we have mentioned above pointing out that a Full Bench of the Calcutta High Court had in *In the matter of the petition of F. W. Robinson* (1) held that no review could lie. Apparently it was not brought to Mr. Justice BANERJI's notice that the point is one which is already covered by a decision of two Judges of this Court. In the case of *Queen-Empress v Durga Charan* (2) a Division Bench of this Court held that the High Court has no power under section 369 of the Code of Criminal Procedure to review an order disposing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government. The Code of Criminal Procedure of 1882 was then in force and in this respect does not differ from the present Code. It is, moreover, in full agreement with the decision mentioned above reported in I. L. R., 14 Calc., 42. No dissent has ever been expressed from this decision of this Court and we can see no reason whatsoever, when the Legislature has not in express terms given this Court statutory power to review its judgement in criminal cases, to differ from the above-mentioned ruling. We, therefore, are clearly of opinion that this application for review in the present matter cannot lie. But we have also to proceed with the decisions of this Court in the cases of *Queen-Empress v Lalit Tewari* (3) and of *Emperor v Kalka* (4), and it is urged before us that, the order of Mr. Justice BANERJI not having been sealed, it is still open to the applicant to come to this Court with the present application. On behalf of the Crown it was urged that the order did not require sealing in view of the language of the rules 5 and 8 of chapter VII of the rules of this Court. It is clear from the office report that such orders are not usually sealed; but in our opinion the rules mentioned above clearly direct that such orders should be sealed. This being so, the two rulings mentioned above do apply to the circumstances of

(1) (1887) I. L. R., 14 Calc., 42. (3) (1899) I. L. R., 21 All., 177.

(2) (1895) I. L. R., 7 All., 673. (4) (1904) I. L. R., 27 All., 91.

1915

EMPEROR v. GOBIND SAHAI

the present case. But in accordance with those two rulings it is only the Judge concerned who can deal with this matter. It will be open, therefore, to the present applicant to make any such application as he deems fit to Mr. Justice BANERJI in view of those two rulings. It is not possible for us to deal with this matter. In so far as it is an application for review, the present application must fail and we reject it. In so far as it is an application contemplated by the two rulings mentioned above, it must be dealt with by Mr Justice BANERJI. For this purpose it must be sent back to Mr. Justice BANERJI, and it will be open to him to pass any such order as he may deem fit.

The case coming back to Mr. Justice BANERJI his Lordship passed the following order.

BANERJI, J.—A Bench of this Court has held that as the order passed by me on the 22nd of July, 1915, was not sealed, this application for revision must be deemed to be still pending. I have heard the learned vakil, who has now appeared for the applicant and who has addressed the Court at considerable length. I see no reason, in view of the findings of the courts below, to admit this application. I accordingly reject it.

Application rejected.

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

1916
December, 11

JAI KISHAN JOSHI (PLAINTIFF) v. BUDHANAND JOSHI AND ANOTHER (DEFENDANTS) *

Act No IX of 1908 (Indian Limitation Act), schedule I, articles 134, 144—Suit for redemption by co-mortgagor—Property already redeemed co-mortgaged and finally sold to second mortgagee—Limitation—Act No IV of 1882, (Transfer of Property Act), section 95.

In 1860 the father of a family of four sons mortgaged some of the family property. In 1877, after the death of the father, one of the sons again mortgaged the property and with the money borrowed on the second mortgage paid off the first mortgage. The second mortgagee in his son remained in possession of the property as mortgagee until 1908, when the second mortgagor sold it to the son of the second mortgagee. In 1912, a grandson of the original mortgagor sued for redemption of the mortgage of 1860.

* Civil Miscellaneous No. 80 of 1916.

1915

JAI KISHN JOSHI v. BUDHANA JOSHI.

Held, that the suit was barred by limitation under article 144 of the first schedule to the Indian Limitation Act, 1908, whatever might have been the position of the members of the family (which were not stated) as regards jointness or separation.

Article 134 does not apply to a person who has interested in part of a mortgage and joins the whole, and is not in the position of a charge-holder and not a mortgagee; *Achhaj Ahood* v. *Wazir Ali* [Ref. distinguished].

THIS was a reference by the Local Government under rule 17 of the Kumaun Rules, 1894.

The facts of the case were as follows:—

One Debi Dat Joshi was owner of a certain number of villages including the village in dispute. On the 13th of August, 1860, he executed a usufructuary mortgage of the village in dispute along with certain other properties in favour of one Debi Dat Panth for a sum of Rs. 451, and it was agreed to redeem the same in four years. Debi Dat Joshi died, leaving his son Jai Dat Joshi, the defendant No. 2 and his grandson, Jai Krishna Joshi, the plaintiff. On the 13th of December, 1877, in order to pay off the debt due on the village in dispute on account of the mortgage of 1860, Jai Dat Joshi, defendant No 2, mortgaged the said village to the father of the defendant No. 1, Buddhi Ballabh Joshi for a sum of Rs. 100 for a term of ten years. The material portion of this mortgage deed was as follows:—"Whereas I am entitled to 126$^{4}/_{16}$ *nales* of land assessed to Rs. 6 7 0 in mauza Sanjari. This share was mortgaged during the time of my father to Debi Dat Panth. I have mortgaged this land to you for Rs. 100." The prior mortgage on the village in dispute was duly paid off and possession obtained by the defendant No. 2. On the 26th of May, 1898, Jai Dat Joshi, the defendant No 2, sold the village in dispute to the defendant No. 1 for Rs. 300. The material portion of the sale-deed ran as follows:—"Whereas I own an ancestral share in the village Sanjari, in which a third shâre amounting to 126$^{4}/_{16}$ *nales* of land assessed to *Rs.* 6-7-0 is the extent of my share. This share was on the 13th of Decem ber, 1877, for a period of ten years, mortgaged to your father, Jai Krishna. Now as this money has not been paid and I am entitled to a *shikmi* partition with my brother Krishna and this very share was mortgaged to pay off the debt of the time of my father, I sell all my rights and interest . . . to you for a sum of Rs. 300." The

(1) (1889) I. L. R., 14 All., 1.

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI

present suit was brought by the plaintiff for possession of the village in dispute against the defendants on payment of Rs. 100, the amount payable on account of the mortgage of 1860. The suit was defended on the ground, *inter alia*, that it was barred by limitation, that Jai Dat, defendant No. 2, was the manager of a joint Hindu family of which the plaintiff was a member, and that for payment of the mortgage debt due upon the said property he had full authority to sell it. The court of first instance (the Assistant Collector of Almora) decreed the suit, holding that the suit was not barred by limitation, "that the four sons of Debi Dat, Joshi were not members of a joint Hindu family, but that their property was joint," that Jai Dat Joshi "had no right to transfer the shares of his brothers and nephews who were not members of a joint Hindu family with him," and that the position of defendant No. 2 was that of a mortgagee of the mortgagee rights in the property in dispute. The plaintiff appealed to the court of the Deputy Commissioner of Almora, who, setting aside the decree of the first court remanded the case to that court with directions to have the plaint amended as indicated in his judgement. The plaint was accordingly amended, but the court of first instance again decreed the suit and confirmed the findings previously arrived at by that court. The plaintiff again appealed to the court of the Deputy Commissioner of Almora, who again set aside the decree of the first court holding that the mortgage of 1860 was paid up and the suit to redeem the same was not maintainable. The Commissioner of Kumaun confirmed the decree of the court of the Deputy Commissioner. At the plaintiff's instance, the Local Government referred the case for the opinion of the High Court under rule 17 of the Kumaun Rules, 1894.

Pandit *Baldeo Ram Dave* (with him Dr. *Surendra Nath Sen*), for the plaintiff:—

There was no finding by the court of first appeal whether the plaintiff and the defendant No. 2 were members of a joint Hindu family of which the defendant No. 2 was the manager. The court of first instance had come to the conclusion that there was no joint family nor was defendant No. 2 a managing member. It had come to the conclusion that at the time the

mortgage of 1860 was redeemed by defendant No. 2, he and the plaintiff were co-owners of the village in dispute. Upon this assumption, when one of two or more co-mortgagors redeems the whole, he, as to the portion which represents the interest of his co-mortgagor, stands in the shoes of the mortgagee from whom he redeems, and as such he has got the same rights and the same liabilities, and the co-owner whose portion has thus been redeemed has the right to redeem such portion from his co-mortgagor on payment of the proportionate amount due upon his share of the property. Such a act of co-mortgagor cannot change the position of the other co-owner to something less than that of a co-mortgagor or to abridge the period of limitation within which he ought to come in to redeem. A Full Bench of this Court has held that a suit by a co-owner for redemption would be governed by article 148 of the second schedule to the Limitation Act, 1877, and the time will begin to run from the time the original mortgage became payable; *Ashfaq Ahmad* v. *Sardar Ali* (1). The position of defendant No. 2 when he redeemed the mortgage of 1860 was as regards the share of the plaintiff, that of a mortgagee. Any mortgage made by him of such rights to the father of defendant No. 1 was a mortgage of his mortgagee rights, and the sale by him of that portion which belonged to the plaintiff did not convey to the defendant No. 1 anything more than what he himself possessed. So far as this Court is concerned it is now settled law that if the transferee for valuable consideration from the mortgagee has actual knowledge that his vendor's title was merely that of a mortgagee, and that he was not under the belief that he was purchasing an absolute interest, the suit against him would not be barred by article 134 of the Limitation Act; *Drigpal Singh* v. *Kallu* (2), *Ghasi Ram* v. *Krishna* (3), *Parmatma* v. *Rameshar Sahai*, L. P. Appeal No. 48 of 1915, decided on the 12th of November, 1915. The defendant No. 1, when he purchased the property from defendant No. 2, was fully aware of the mortgage of 1860 and its redemption by one of the co-sharers as the facts recited in the mortgage-deed of 1877 and the sale-deed of 1898 conclusively indicate.

(1) (1892) I. L. R., 14 All., 1. (2) (1903) I. L. R., 27 All., 609.
(3) (1910) 13 A. L. J., 877.

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI

Mr. *M. L. Agarwala*, for defendant:—

It is not necessary to go into the question as to whether the family was joint or separate. Under section 25 of the Transfer of Property Act the defendant No. 2 was nothing more than a *charge-holder*. Article 134 of the Limitation Act was not applicable as he was not a *mortgagee* within the meaning of that article. The only article which would be applicable would be article **144**, and the suit was barred by limitation.

Pandit *Baldeo Ram Dave*, was heard in reply.

TUDBALL, J.—This is a reference by the Local Government under rule 17 of the rules and orders relating to the Kumaun division, 1894.

One Debi Dat Joshi had four sons (1) Krishna Nand, (2) Yangya Dat, (3) Narotam, (4) Jai Dat, defendant No. 2. The first is dead and his son Chandramani has also died without issue.

The plaintiff, Jai Krishna, is the son of the second son. The third has died without issue. Jai Dat, defendant 2, is the fourth.

The property now in suit is part of the family property. On the 13th of August, 1860, Debi Dat Joshi gave a usufructuary mortgage of this and other property to one Debi Dat Panth for a sum of over Rs. 400.

After the former's death, the defendant Jai Dat repaid Rs. 100 out of the mortgage debt to the mortgagee, who thereupon released to him the property now in suit. Jai Dat, to obtain this sum, made a similar mortgage of this same property for the sum of Rs. 100 in favour of Jai Krishna Joshi (deceased), father of defendant No. 1, Buddhi Ballabh Joshi.

This was on the 13th of December, 1877, and for a period of ten years. In the deed Jai Dat clearly stated that the mortgaged property belonged to himself, that it was his *maurusi* village and he owned this share; that it had been mortgaged by his father to Debi Dat Panth and as the latter was pressing for payment he, therefore, mortgaged it, in order to be able to pay off Debi Dat Panth. He agreed that when he paid off the mortgage money he would also repay to his mortgagee whatever sum the latter had paid to Government as revenue during the running of the mortgage.

1916

JAI KISHAN JOSHI v. DEONANDAN JOSHI.

For nearly twenty-one years his mortgagee remained in possession *as such* until the 26th of May, 1898. On this latter date Jai Dat Joshi, being unable to pay off the debt, sold the property to the defendant No. 1, Pandit Bakshi Joshi, the son of the mortgagee, for this sum of Rs. 300. Of this Rs. 286 paid off the debt and the vendor took the balance in cash. From that date the vendee has remained in possession until the present suit was brought in the year 1912, i.e., some fourteen years afterwards.

The suit is one to redeem the mortgage of 1860, created by Debi Dat Joshi, and the plaintiff claims possession of the whole of the property on payment of Rs. 100. The court of first instance decreed the claim on payment of Rs. 328-8-6.

The courts of first and second appeal differed on the case. In the reference to the Court we are asked to answer (1) whether or not the case should be remanded to the court of first appeal for redecision of the appeal on the merits, (2) whether it is for the court of second appeal to decide the issue whether Jai Dat Joshi had ever acquired title as joint family or not; (3) the correctness or otherwise of the decision of the court of second appeal. To these there has been great confusion in the pleadings in the case. In the order of reference it is assumed that the family was joint, whereas in the arguments before us that is a disputed fact. The defendant's case is that the family was joint and Jai Dat Joshi was the managing member. The plaintiff's case is set out from time to time in the various plaints filed. In this Court on his last plaint, he said that the family had separated, but the property had not been divided.

No issue whatever was framed as to whether Jai Dat Joshi or Jai Dat was or was not the managing member of the joint family. The court of first instance assumed that the family was joint and in its finding on the fourth issue "how far the mortgage of 1877 and the sale of 1898 affect plaintiff's right of redemption"—it remarked:—"I am not satisfied that he was the manager of the joint family."

Assuming for the moment that the family was joint, and that Jai Dat was not the managing member, the fact is that one member of a joint family mortgaged a part of the family property in 1877, paid off a prior mortgage debt due thereon from the

1915

JAI KISHAN JOSHI v. BUDHA NAND JOSHI.

family and then in 1898 sold the property to the second mortgagee who has been in possession for over twelve years.

As a person interested in the mortgaged property he had power to redeem the mortgage of 1860 and that mortgage no longer exists and cannot now be redeemed. There is no question of "subrogation" in the matter. The second mortgagee paid his money to Jai Dat, as the deed shows, and the latter paid off the first mortgagee. If the principle did at all operate it would do so for the benefit of the second mortgagee. The defendant No. 1 does not seek to stand upon the first mortgage. In the circumstances assumed it is clear that he having purchased from a member of the family incompetent to sell, has held adversely to the joint family for over twelve years and the suit against him must fail.

Next if we assume that the family was joint and that Jai Dat was its managing member no suit for redemption of the mortgage of 1860 can lie and the defendant has clearly held adversely against the joint family since the date of his purchase. In this aspect the suit must equally fail.

Assuming, however, that the family was separate (although the properties had not been divided among the co-owners) other considerations arise.

When in 1877 Jai Dat redeemed the mortgage of 1860 he acquired a charge on the plaintiff's share for the latter's share of the debt paid (vide section 95 of the Transfer of Property Act). This statute no doubt was not then in force, but it did not on this point make any alteration in the law of mortgage as previously administered. If Jai Dat had not dealt further with the property, but had merely taken possession and held it, the plaintiff would, under the ruling of this Court in *Ashfaq Ahmad* v. *Wazir Ali* (1), have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jai Dat on payment of his share of the debt. Article 148 of schedule II of the Limitation Act of 1877 was applied by the Full Bench of this Court to a suit of such a nature, though that article in terms applies only to a suit to redeem a mortgage; whereas section 95 of the Transfer of Property Act shows that the co-owner

(1) (1889) I. L. R., 14 All., 1.

redeeming merely acquires a charge, which is very different from a mortgage. In any case the co-owners thus suing cannot sue to redeem the original mortgage, but only to recover his own share of the property redeemed by payment of his share of the expense. In the case before us, however, the matter is complicated by the transfer by Jai Dat, i.e., the mortgagee of 1877 and the sale of 1893.

1915

JAI NARAIN Joint v. RUDRANAND Joint

In the case of each of those he purported to transfer property belonging to himself, and his transferee has held for thirty-one years as mortgagee and fourteen years as vendee.

Either article 144 or article 134 of the second schedule to the Limitation Act will apply to a suit for possession of the plaintiff's share. On behalf of the plaintiff, it is urged that he is in the position of a mortgagee suing to recover possession of property from a transferee from his mortgagee and that article 134 would apply, and therefore, under the rulings of this Court, there must be a finding as to whether the transferee took in good faith and in ignorance of the plaintiff's rights or with a full knowledge of those rights, and therefore, the suit should be remanded to the court of first appeal for a finding on that question of fact. On behalf of the defendant, however, it is urged that article 134 does not apply, as this is no case of a transfer by a mortgagee; that the decision in *Ashfaq Ahmad* v. *Wazir Ali* (1) can only be applied in a suit by one co-owner to redeem his share from the co-owner who has paid off the mortgagee and its principle should not be extended to article 134, where the suit is one between the co-owner and a third person, a transferee, and that section 95 of the Transfer of Property Act clearly shows that Jai Dat was merely a charge holder and not a mortgagee and that article 144 is the only article which can and ought to apply. "In my opinion section 95 of the Transfer of Property Act clearly shows that Jai Dat became merely a charge-holder when he paid off the mortgage of 1860. The fact that, as regards his co-owners his position became analogous to that of a mortgagee does not make him a mortgagee when the law clearly states that he is only a charge-holder.

In my opinion article 144 applies. The defendant appellant has held adversely clearly from the year 1893. There is no

(1) (1892) I. L. R., 14 All., 1

1915

JAI KISHAN JOSHI v. BHOPANAND JOSHI

question of fraud or collusion. The contending defendant has held the property some thirty-five years prior to suit as usufructuary mortgagee and vendee from Jai Dat, and the plaintiff has remained silent and unquestioning. Both the mortgage and the sale-deed were registered. It, therefore, is clear to my mind that whether the family was joint or separate the suit was bound to fail. I would, therefore, answer the two questions as follows:—(1) It is unnecessary, in the circumstances of this case, to give any finding on the question as to whether Jai Dat Joshi represented the family or not; though it is obvious that the suit would in either event have failed, as the defendant and defendant's vendor had been in adverse possession for more than twelve years, and perhaps more for the reasons stated by Imam J., and (2) that the decree of the Court below is correct. I would order the plaintiff to pay all costs in all Courts.

PIGOTT J.—I concur generally. I would add that I consider it necessary to remind the suit is barred by limitation on the facts stated by the plaintiff himself. The case on the latter point might be on the assumption that Jai Dat and his brothers had separated, but had left the property in suit undivided. Assuming these facts, the suit would be barred under the principle laid down by this Court in *Ashfaq Ahmad* v. *Bazir Ali* (1) so far as adverse possession. The point may be stated thus: Until the holder of a charge under section 95 of the Transfer of Property Act (No. IV of 1882) is in possession of the property which is the subject of that charge, what is the limitation applicable to a suit by the owners of the said property for recovery of possession on payment of the charge? The question is not free from difficulty, and the view taken by this Court has not been universally accepted. The operation of article 144 of the schedule to the Indian Limitation Act can only be avoided by bringing the case under the operation of some other article of the schedule. If article 144 be applied, then the further question will arise as to the circumstances under which the possession of the charge-holder becomes adverse to that of the owners. This Court saw a way out of the difficulty by laying down the principle that the possession of the charge-holder should be regarded as that of the original mortgagee, the provisions of

(1) (1888) I. L. R., 14 All., 1.

1915

JAI KISHAN JOSHI v. PURUSHANAND JOSHI

article 148 of the schedule to the Limitation Act being applied so as to permit the owners to sue for possession by redemption of the charge within sixty years of the date of the original mortgage. The question then before the Court was one of limitation only; it was not laid down that the possession of the charge-holder should be regarded as in all respects equivalent to the possession of a mortgagee. That point was not considered at all. In the present case the charge-holder has been claiming title in himself adversely to the persons whom we must, for the sake of argument, regard as the true owners, ever since he redeemed the original mortgage. He has himself transferred the property in suit, first by way of mortgage and then by way of sale. The present suit is not against the alleged charge-holder only, but principally against his transferee. It seems to me obviously impossible to apply the provisions of article 148 to the present suit; nor is such application necessitated by any principle laid down in the case of *Ashfaq Ahmad* v. *Wazir Ali* (1). It follows that the present suit can only be saved from the operation of article 144 by bringing it under article 134. On this point I have felt some doubt. It is very difficult to apply article 134 on its strict wording; the only doubt in my mind is whether the learned Judges who decided the case of *Ashfaq Ahmad* v. *Wazir Ali* (1) would not have regarded its application as a legitimate extension of the principle which they laid down as to the charge-holder's stepping into the shoes of the original mortgagee. On the whole, I think it sufficient to say that I am not prepared to dissent from the view taken by my learned colleague. For one thing I do not think it worth while to do so on the facts of the present case; the application of article 134 might necessitate a remand for a further finding as to the *bona fides* of the transferee defendant and the payment of consideration, but I do not feel any serious doubt that it would result in the dismissal of the suit. Accepting article 144 of the schedule as the proper article to be applied, I can feel no doubt whatever that the possession of the principal defendant has been adverse to the plaintiff for more than the statutory period of twelve years. I concur, therefore, in answering the reference as proposed by my learned colleague.

Record returned.

(1) (1889) I. L. R., 14 All., 1.

1915
December, 18

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Walsh

MUHAMMAD ALI AND ANOTHER (DEFENDANTS) *v.* BALDEO PANDE (PLAINTIFF)*

Mortgage—Suit for redemption—Tender of mortgage money a condition precedent to the institution of a suit for redemption.

A usufructuary mortgage of agricultural land provided that the right to redeem should be exercised only in the month of *Jeth* of any year.

Held, that before the mortgagor could sue for redemption it was necessary for him to prove that he had tendered to the mortgagee the mortgage-debt or such amount as he considered due on the mortgage in the month of *Jeth* of some year after the mortgage money had become payable. *Banki v. Girdhar Lal* (1) followed.

THIS was a suit for redemption of a usufructuary mortgage of agricultural land. The court of first instance decreed the claim in part, and the lower appellate court confirmed the decree. The defendants appealed to the High Court, their main ground of appeal being that the mortgagor had failed to prove, as was incumbent on him, that, before the suit was filed, he had, according to the provisions of the mortgage-deed, tendered the mortgage money to the mortgagees during the month of *Jeth* in some year. It was found as a fact that no such tender had been made.

The Hon'ble Mr. *Abdul Raoof* and Maulvi *Iqbal Ahmad*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondent.

TUDBALL and WALSH, JJ.:—This is the defendants' appeal arising out of a suit for redemption. The mortgage-deed is dated *Miti Asadh Badi* 7th, *Sambat* 1948, corresponding with the 29th of June, 1891. It was for a term of five years certain and it was an agriculturist's mortgage, in which the parties laid down a condition that the right to redeem should be exercised only in the month of *Jeth* of any year. The courts below have decreed the suit. The defendants raised a plea that the plaintiff had made no payment or offer of payment before bringing his suit. The plaintiff in paragraph 5 of the plaint

* Second Appeal No. 1472 of 1914, from a decree of H. E. Lane, Subordinate Judge of Mirzapur, dated the 21th of July, 1914, confirming a decree of Shibendra Nath Banerji, Munsif of Mirzapur, dated the 15th of February, 1914.

(1) Weekly Notes, 1894, p. 148.

1915

MUHAMMAD ALI v. BALDEO PANDE

stated that on the 18th of June, 1913, he had expressed his readiness to redeem the property and offered to pay the mortgage money to the defendants, but the latter declined to allow redemption. In paragraph 6 of the plaint he stated that the cause of action had accrued to him on the 18th of June, 1913, the date of the mortgagee's refusal. The courts below have found as a fact that the plaintiff had not made any tender of the mortgage money at any time to the mortgagees, but in spite of this they proceeded to give the plaintiff a decree allowing redemption of the mortgaged property in the month of *Jeth* following the date of the decree. The defendants have appealed, and the plea raised on their behalf is that in view of the fact that the plaintiff had at no time offered to pay the mortgage debt prior to the institution of the suit he had no cause of action and the suit ought to have been dismissed. Reliance is placed on the ruling in *Banei* v. *Girdhari Lal* (1). The two cases are parallel. In that case, as in the present, there was an agricultural mortgage and the parties had laid it down in clear terms that the mortgage was redeemable only in the month of *Jeth*. It is unnecessary to give the reasons why such a term is entered in this class of mortgage. Section 60 of the Transfer of Property Act lays down what a right of redemption is. It clearly shows that the right to recover possession does not arise until the mortgagor has at the proper time and place paid or tendered the mortgage money. It is contended that this section was not in force at the date of the mortgage, and that the principles of justice, equity and good conscience should be employed for the decision of this case. This would seem to be an argument that section 60 of the Transfer of Property Act is not based on principles of justice, equity and good conscience. It clearly is based on such principles, and it seems even a matter of business or common sense that a mortgagor has no right to institute a suit for redemption, unless and until he has tendered to the mortgagee the debt due to the latter, or at least the amount which he considers to be due to the latter. The point before us is clearly covered by the decision in *Banei* v. *Girdhar Lal* (1), which was subsequently followed by this Court in *Hafiz Muhammad Akbal Rahim* v. *Lala Tulshi Prasad* (2). The facts of both these cases

(1) Weekly Notes, 1894, p. 149.

(2) S. A. No. 1741 of 1903, decided on the 22nd of June, 1905.

1916

MUHAMMAD ALI v. BALDEO PANDE.

are like those of the present case. It is clear, therefore, that the plaintiff's suit was brought without any cause of action and ought to have been dismissed. We, therefore, allow this appeal, set aside the decrees of both the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

FULL BENCH.

1915
December, 22.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

NURI MIAN (DEFENDANT) v. THE GANGES SUGAR WORKS, LIMITED, CAWNPORE (PLAINTIFF).*

Civil Procedure Code (1908), *section* 109, *clause* (*a*); *order XLI, rule* 23—*Appeal to His Majesty in Council*—"*Final order*"—*Order of remand which decided finally only one issue out of several.*

Held, that an order of remand made by the High Court which decided finally only one issue out of several which were raised by the proceedings before the court of first instance was a "final order" within section 109, clause (*a*) of the Code of Civil Procedure, and not a "final order" within the meaning of section 109, clause (*a*) of the Code.

THE facts of this case were as follows:—

The Ganges Sugar Works Company made an application under schedule II, article 17, of the Code of Civil Procedure to file an alleged contract to submit to arbitration. The court of first instance dismissed the application on the sole ground that the agreement, not being under the seal of the company, was invalid. No evidence was recorded. There were several other objections to the agreement, *e.g.*, fraud, vagueness, misrepresentation, etc. The High Court reversed the decree of the court below and remanded the case for trial of the other issues under order XLI, rule 23, of the Code of Civil Procedure. After the remand the court below tried the case and decided against the objector. An appeal from that decree is pending in the High Court. The objector filed an application for leave to appeal to His Majesty in Council from the order of remand.

Dr. *S. M. Sulaiman*, for the applicants, submitted that the order of this Court was a "final order" within the meaning of clause (*a*) of section 109 of the Code of Civil Procedure. He

* Privy Council Appeal No. 12 of 1916.

relied on the case of *Saiyid Muzhar Hossein* v. *Musammat Bulkis Bibi* (1). This order could not be questioned again in the suit, and it was the cardinal point in the suit. He also relied on *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhry* (2), *Saratmani Debi* v. *Bata Krishna Banerjee* (3), *Chandra Kunwar* v. *Chaudhri Narpat Singh* (4), *Dwarka Nath Sarkar* v. *Haji Mahomed Akbar* (5), *Hafiz Abdul Rahim Khan* v. *Raja Hari Raj Singh* (6) and *Meghraj* v. *Bidyakati Koer* (7). The expression "final order" was defined in several English cases, and the result thereof was summarised in HALSBURY'S LAWS OF ENGLAND, Vol. 18, p. 178. He submitted that the question whether the agreement was not an invalid agreement for want of the seal of the company was decided by this Court against the petitioner and this question could never be re-opened by the petitioner in the appeal against the final decree. Consequently, the case was otherwise fit for appeal within the meaning of section 109 of the Code of Civil Procedure. He also contended that the applicant would be precluded from questioning the correctness of the order of remand when he appealed from the final decree. See, for instance, section 97 of the Code of Civil Procedure.

Pandit *Kailash Nath Katju* (for The Hon'ble Munshi *Gokul Prasad* and Mr. *W. Wallach*), for the opposite party, submitted that in such cases the nature of the suit and also the nature of the order were to be looked at. If an order determined only a part of the case and left other matters still to be determined, it would not be a "final order" within the meaning of section 109 of the Code of Civil Procedure. He relied on *Baij Nath Dass* v. *Soham Bibi* (8). He submitted that, after the order of this Court, the court below had tried out the case and found against the petitioner on all the points and the petitioner had filed an appeal against that order and it would be inexpedient to grant leave to appeal against a portion of the case. He also relied on *Ahmad Husain* v. *Gobind Krishna Narain* (9) and *Krishna Chandra Ghosh* v. *Maharaja Ram Narain Singh* (10). The case

(1) (1894) I. L. R., 17 All., 112.
(2) (1908) I. L. R., 36 Calc., 618.
(3) (1909) 10 C. L. J., 386.
(4) (1906) I. L. R., 29 All., 154 (188).
(5) (1910) Indian Cases, 622.
(6) (1900) I. L. R., 22 All., 455.
(7) (1914) 21 C. L. J., 270.
(8) (1900) I. L. R., 31 All., 545 (550).
(9) (1911) I. L. R., 33 All., 351.
(10) (1913) 21 Indian Cases, 410.

1916

NURI MIAN v. THE GANGES SUGAR WORKS, LD.

reported in Indian Law Reports, 17 Allahabad, at page 26, was considered and explained in *Mujtaba Hussain* v. *Jamaluddin* (1) and the trend of decisions since had been to hold that an order of remand was not a "final order" within the meaning of section 109 of the Code of Civil Procedure.

Dr. *S. M. Sulaiman*, replied.

RICHARDS, C. J., and TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is an application for leave to appeal to His Majesty in Council. The Ganges Sugar Works Company made an application under schedule II, rule IV, of the Code of Civil Procedure to file an alleged contract to submit to arbitration. The court of first instance, without recording any evidence or in any way considering the merits of the case, dismissed the application on the sole ground that the alleged contract not being under the seal of the company was invalid as an agreement to submit to arbitration. The company appealed and this Court held that the agreement to submit to arbitration did not require to be under the seal of the company and made an order remanding the case for decision upon the merits. The decision of this Court will be found reported in I. L. R., 37 Allahabad, at page 273. It is contended on behalf of the applicant that the order of this Court is a "final order" passed on appeal within the meaning of section 109, clause *(a)*, of the Code of Civil Procedure. The meaning of the expression "final order" is by no means very clear. The authorities dealing with a similar expression in other enactments in England are very conflicting. There have been several cases in this Court and in other courts in India where the question as to what is a "final order" has been discussed and decided. Here again there is a considerable conflict of authority. We propose to deal with the present application on its own circumstances.

No doubt, if the only issue between the parties was the validity of the contract (it not being under seal) the decision of this Court would have finally decided the only matter between the parties. The matter in dispute was whether or not this contract should be filed as a submission to arbitration. If this Court held that it was necessary that the contract should be under seal, the application

(1) (1904) 1 A. L. J., 26.

of the company would be finally dismissed. If on the other hand it decided that it was not necessary that the document should be under the seal of the company, it would have ordered the contract to be filed. We find, however, that the alleged contract was challenged on several other grounds. It was challenged on the ground that it was invalid for vagueness and that the agreement had been obtained by fraud and misrepresentation. The result was that, even if this Court decided in favour of the company on the question of the seal, it would not have finally disposed of the matters in dispute between the parties. It is conceivable that if the order of remand of this Court was appealed to the Privy Council, there might be one or more other appeals arising out of the other pleas in the same matter. No doubt the decision of this Court was upon a very important issue between the parties, but the very same thing might be said if this Court decided (overruling the court of first instance) that the loss of a document was sufficiently proved to admit of secondary evidence of its contents and remanded the case to take that evidence and decide the case upon the merits. The only distinction between such a case and the present would be that in the present case the question was one purely of law, while in the supposed case it would be a question of fact or partly of fact and partly of law. Again we may suppose the case of an objection taken to a deed of mortgage on the ground that it had not been properly registered. If this Court (overruling the decision of the court of first instance) held that the registration was sufficient and remanded the case for decision upon the merits, it could hardly be said that the order of remand was a "final order" within the meaning of section 109, clause *(a)*, of the Code.

We could no doubt grant special leave to appeal under clause *(c)* of section 109. The point of law can hardly be said to be a question of "general importance" in view of the change that has been made in the new Companies Act. Furthermore, it appears that since the order of remand of this Court against which it is sought to appeal was passed, the court below has heard and determined the other issues in the case, and they are the subject matter of a pending appeal to this Court.

1915

NEPI MAL v. THE GANGES SUGAR WORKS, LD

Under these circumstances we do not think that there are sufficient grounds why we should grant the certificate under clause (c).

The application fails and is dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

1915 December, 23.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

NARAIN DAS AND ANOTHER (PLAINTIFFS) v. MUSAMMAT DRAWJA (DEFENDANT).*

Minor—Purchase of immovable property by minor—Suit by purchaser for possession of property purchased—Act No IV of 1882 (Transfer of Property Act), sections 54 and 56.

A minor is capable of purchasing immovable property, and where such a purchase has been completed by execution and registration of a conveyance he can sue to recover possession of the property purchased upon tender of the balance of the purchase money. Such a suit is not a suit for specific performance of a contract and no question of mutuality arises. *Mir Sarwar v. Fateh Muhammad Chowdhuri* (1) and *Mohori Bibee v. Dharmodas Ghose* (2) distinguished. *Sital Lal v. Bhagwan Das* (3), *Bayjnath Singh v. Fatta* (4), *Velayutha Chetty v. Govindasami Naidan* (5), *Ujfal Rai v. Gauri Sanchar* (6), *Maxud Kunwar v. Madan Gopal* (7), *Bahadurdin v. Rafaqat Husain* (8), *Rajkumari Bibiah v. Haji Sirdar Mahomed* (9) and *Muniya Kottan v. Paramal Kenan* (10) referred to. *Nanakutti Narayana Chetty v. Lingalinga Chetty* (11) dissented from.

THE facts of this case were as follows:—

A sale-deed of a house was executed by Musammat Radha and others in favour of Suraj Bhan, a minor. The consideration was expressed to be Rs. 1,250. The executants refused to have the deed registered, but it was compulsorily registered by order of the District Registrar. Suraj Bhan then sued for possession of the house. It was stated that out of the consideration of Rs 1,250

* Second Appeal No. 1559 of 1914, from a decree of O. F. Jenkins, District Judge of Agra, dated the 1st of August, 1914, confirming a decree of Sheikh Nabi Bakhsh, Subordinate Judge of Agra, dated the 8th of May, 1914.

(1) (1912) I. L. R., 39 Calc., 282
(2) (1902) I. L. R., 30 Calc., 539.
(3) (1888) I. L. R., 11 All., 244.
(4) (1905) I. L. R., 30 All., 125
(5) (1907) I. L. R., 30 Mad., 544
(6) (1911) I. L. R., 33 All., 657
(7) (1915) I. L. R., 38 All., 62
(8) (1913) 18 Indian Cases, 451.
(9) (1915) 18 Oudh Cases, 115.
(10) (1911) 24 M. L. J., 359.
(11) (1909) I. L. R., 33 Mad., 342.

1915

NARAIN DAS v. MUSAMMAT BUANIA

a sum of Rs. 51 only, as earnest money, had been paid. The plaintiff signified his willingness to pay the balance of the consideration remaining due. Both the lower courts dismissed the suit on the ground that the contract entered into with a minor was void. The lower appellate court also remarked that there was a non-joinder of certain defendants. The plaintiff appealed.

Munshi *Damodar Das*, for the appellant:—

There is nothing to prevent a minor from being a transferee, or acquiring ownership of property. Under section 54 of the Transfer of Property Act, a registered instrument of sale passes the full title to the transferee and it is immaterial that a part of the price has remained unpaid; *Baijnath Singh* v. *Pathi* (1). As transferee and owner of the property a minor is entitled to recover possession thereof from any person who may be in possession. The present suit is one for possession, brought on the basis of the sale-deed which conferred ownership on the plaintiff; it is not a suit for specific performance of a contract. Although the sale-deed is expressed to be in favour of the minor, still there is a recital in it that the consideration has been received from Narain Das, the father and natural guardian of the minor. The receipt for the earnest money also shows that the negotiations for the sale were conducted and completed by Narain Das. The plaint also sets out that the sale was negotiated and concluded through Narain Das on behalf of the minor. The minor himself did not enter into any agreement or personal obligations. Any personal obligations arising out of the negotiation would have to be discharged by Narain Das. It has been ruled that under such circumstances a transfer in favour of the minor is valid and the minor can sue for possession; *Ulfat Rai* v. *Gauri Shankar* (2), *Munni Kunwar* v. *Madan Gopal* (3), *Muniya Konan* v. *Perumal Konan* (4), *Amer Chand* v. *Nathu* (5). In the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (6), which is relied on by the lower court, the minor sued for specific performance of a mere contract to sell.

(1) (1906) I. L. R., 30 All., 125.
(2) (1911) I. L. R., 33 All., 687.
(3) (1915) I. L. R., 38 All., 62.
(4) (1911) 24 M. L. J., 852.
(5) (1910) 7 A. L. J., 857.
(6) (1911) I. L. R., 39 Calc., 232.

1911

NAGAIN DAS v. MUSAMMAT DHANI

That ruling does not apply to the facts of the present case where ownership has passed to the minor by virtue of the sale-deed.

As to non-joinder, no necessary party has been left out from the array of parties.

Munshi *Kanhaiya Lal*, for the respondents:—

The present suit is not a suit for possession pure and simple. The plaintiff has to do something before he can ask for possession. Both the contracting parties have still to do something and the contract is not an executed contract. The suit is for specific performance of an executory contract. No specific performance can be obtained of a contract, any one of the parties to which is a minor, or, in other words, where anything remains to be done on a contract with a minor the doing of that thing cannot be legally enforced, as there is no mutuality in such a contract. A sale in its inception necessarily implies mutual agreements as to the terms thereof. There must be mutuality of obligations before a transaction of sale is completed. The imposition and incurring of those obligations involves the existence of competency to contract. A minor, therefore, cannot be a party to a sale transaction. Where the fundamental mutual agreement which forms the basis of a sale is void by reason of the incompetency of either party, the mere fact of the execution of a sale-deed cannot make the whole transaction valid; *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1), *Mohori Bibee* v. *Dharmodas Ghose* (2), *Nagabotti Narayana Chetty* v. *Loyalinga Chetty*. (3) The ruling in I. L. R., 38 All., p. 62, is not in point on a question of contract. It is in my favour so far as the question of specific performance of a contract is concerned. That there was no mutuality of obligations would be obvious from the consideration that a suit by the defendant for the unpaid balance of the consideration would be forthwith defeated on the ground of the plaintiff's minority.

Munshi *Damodar Das*, in reply:—

The case in I. L. R., 33 Mad., 312, relied on by the respondent was not followed in the later Madras case in 24 M. L. J., 352, cited above.

(1) (1911) I. L. R., 30 Calc., 232. (2) (1903) I. L. R., 30 Calc., 539 (547).
(3) (1909) I. L. R., 33 Mad., 312.

1915

NARAIN DAS v. MUSAMMAT DHANJA

The following cases are also in my favour:—

Raghunath Bakhsh v. *Haji Sheikh Muhammad Bakhsh* (1), *Bahauddin* v. *Rafaqat Husain* (2) and *Shib Lal* v. *Bhagwan Das* (3).

BANERJI, J.—This appeal arises in a suit brought by Suraj Bhan, a minor, through his guardian and next friend, for possession of a house. It is stated in the plaint that Musammat Radha was the owner of the house and jointly with the defendant and Musammat Jeoni, now deceased, sold it to the plaintiff "through his father and guardian Narain Das" under a sale-deed, dated the 1st of April, 1912; that out of the amount of consideration for the sale they received Rs. 51 as earnest money; that they refused to have the sale-deed registered, but the plaintiff got it compulsorily registered; that Musammat Radha and Jeoni are dead and the defendant is in possession of the house; that the plaintiff repeatedly asked the defendant to receive the balance of consideration money, but the latter refused to take it and has withheld possession. It is further alleged in the plaint that the plaintiff is ready and willing to pay the balance of consideration and it is prayed that it be caused to be paid to the defendant.

The defendant, in her written statement, denied the execution of the sale-deed and pleaded that even if it was executed by Musammats Radha and Jeoni, she was not bound by it, that it was invalid and that no relief could be granted to the plaintiff on the basis of it.

The courts below have not tried the case on the merits. They have treated the suit as one for specific performance of a contract and have held that a minor being incapable of entering into a contract could not purchase property and that the plaintiff is, therefore, not entitled to maintain the suit. On this preliminary ground they dismissed the suit. The learned District Judge relies on the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (4). In the argument before us the case of *Mohori Bibee* v. *Dharmodas Ghose* (5), also decided by their Lordships, has been referred to

(1) (1915) 18 Oudh Cases, 115.
(2) (1913) 18 Indian Cases, 451.
(3) (1888) I. L. R., 11 All., 241.
(4) (1911) I. L. R., 39 Calc., 232.
(5) (1903) I. L. R., 30 Calc., 539.

1915

NAHAR DAS v. MUHAMMAD EHSAN.

on behalf of the respondent. In our judgement neither of these rulings has any bearing on the present case. In the case last mentioned the suit was brought against a minor to enforce a contract entered into by him. It was held that such a contract was void and could not be enforced. The former was a suit on behalf of a minor for specific performance of a contract to sell. It was held that such a contract could not be specifically performed. The suit before us is not a suit to enforce a contract against a minor and it is not a suit for specific performance of a contract. The court below is, in our opinion, wrong in holding that this is a suit for specific performance. The suit is not based on a contract; but is founded on the title acquired by the plaintiff under the sale-deed executed in his favour. The sale is referred to as evidence of his title. Where a contract has been made for sale of immovable property and that contract has not been completed by the execution of a sale-deed, no title in the property is vested in the purchaser until the execution of the sale-deed. This is provided in section 54 of the Transfer of Property Act in the following terms:—"A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." In the case of a transaction which has not advanced beyond the stage of a contract to sell, the remedy is a suit for specific performance of the contract. Where, however, a sale-deed has been executed and, in the case of tangible immovable property of the value of one hundred rupees and upwards, registered, the title to the property vests in, and the ownership of it passes to, the purchaser. And as held in *Shib Lal* v. *Bhagwan Das* (1) and *Baijnath Singh* v. *Paltu* (2), this will be so even if the purchase money has not been paid. In such a case the remedy is not a suit for specific performance, but one for possession on the strength of the ownership acquired by virtue of the sale-deed. The present suit is a suit of this last description and not one for specific performance. A sale has been defined in section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised and part paid and part promised." Pre-payment of price is not a

(1) (1888) I. L. R., 11 All., 244. (2) (1908) I. L. R., 30 All., 126.

condition precedent to the transfer of ownership and a transaction is none the less a sale if the price has not been paid in whole or in part. By section 55, sub-section (1) *(f)* of the same Act, it is provided that a seller is bound, on being so required, to give the buyer possession of the property sold. If the whole of the purchase money has not been paid the seller is entitled, under sub-section (3) of the same section, to withhold documents of title. He is also entitled, under sub-section (4), clause *(b)*, to a charge for unpaid purchase money "upon the property in the hands of the buyer." This last clause assumes that the ownership of the property has passed to the buyer. It was held by the Madras High Court in *Velayutha Chetty* v. *Govindasawmi Naiken* (1), that the "lien of the unpaid vendor of land under section 55 of the Transfer of Property Act is non-possessory. He has only a right to retain the title deeds and to a charge for the unpaid purchase-money, but he cannot retain possession of the property sold against the vendee." As pointed out by the learned Judges, this view is also in consonance with the English law on the subject. (See Fisher on Mortgages, 6th Edition, § 505). It is thus clear that non-payment of consideration does not prevent the transfer of ownership to the buyer and does not entitle the seller to retain and withhold possession. No doubt, on equitable principles, the court will not make a decree for possession in favour of the purchaser without attaching to it a condition directing payment of the purchase money. This was done in the two cases decided by this Court to which we have referred above. But non-payment of the purchase money is, as shown above, immaterial, so far as the question of the vesting of title is concerned. In the present case it was alleged on behalf of the plaintiff that he was always ready and willing to pay the balance of purchase-money but that the defendant had refused to take it. It cannot, therefore, be said that non-payment of the purchase-money vitiates the title acquired under the sale-deed.

The next question to be considered is whether the fact of the minority of the plaintiff affects his right to maintain this suit. The Transfer of Property Act does not declare a minor to be incompetent to purchase property, and we have not been referred

(1907) I. L. R., 30 Mad., 524.

1915

NARAIN DAS v. MUHAMMAD PRANIA.

to any other statutory enactment which disqualifies him from doing so. On the contrary there is a mass of authority in favour of the view that a minor can acquire and hold property. The purchase of property by a minor through his guardian is very common in this country. It was held by this Court in *Ulfat Rai* v. *Gauri Shankar* (1) that there is "nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immoveable property." The same view was held by the learned Chief Justice and RAFIQ J., in the recent case of *Munni Kunwar* v. *Madan Gopal* (2). The Calcutta High Court in *Bahaluddin* v. *Rafiqat Husain* (3) and the Judicial Commissioner of Oudh in *Raghunath Bakhsh* v. *Haji Sheikh Mahomed* (4) expressed the same opinion. The only decision to the contrary is that of the Madras High Court in *Navakotti Narayana Chetty* v. *Logalinga Chetty* (5). With great respect we are unable to agree with the learned Judges who decided that case. It is to be observed that the view taken in this case was not adopted by that Court in the later case of *Muniya Konan* v. *Perumal Konan* (6). In *Mohori Bibee* v *Dharmodas Ghose* (7) and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (8) their Lordships of the Privy Council did not decide that a minor could not purchase property, and we do not understand the effect of those rulings to be to declare him disqualified.

It was strenuously argued on behalf of the respondent that, although the fact of the purchaser in this case being a minor might not have precluded him from maintaining the suit, the circumstance that a great part of the consideration remained unpaid made a difference, that the seller was entitled to retain possession in enforcement of her lien for unpaid purchase money and that she could not sue the plaintiff for the balance of the purchase money, the contract by him to pay it being void by reason of his minority. As we have already pointed out, non-payment of consideration does not prevent a purchaser from acquiring title under his purchase and it is immaterial whether he is a minor or of full age. We have also shown above that the seller's lien for unpaid

(1) (1912) I. L. R., 33 All., 667.
(2) (1915) I. L. R., 38 All. 62.
(3) (1912) 16 Indian Cases, 481.
(4) (1915) 19 Oudh Cases, 115.
(5) (1908) I. L. R., 33 Mad., 312.
(6) (1911) 24 M. L. J., 352.
(7) (1902) I. L. R., 30 Calc., 539.
(8) (1911) I. L. R., 39 Calc., 202.

purchase-money does not entitle him to retain possession of the property sold. We have also pointed out that under the rulings of this Court the decree for possession in a case like this must be subject to the condition that the balance of the purchase-money should be paid by the plaintiff. There would, therefore, be no occasion for the defendant to sue for the purchase-money. Furthermore, the plaintiff's case is that he offered the purchase-money and has always been and still is ready to pay it. If, therefore, he was competent to purchase, the fact of non-payment of the purchase-money, under the circumstances alleged, cannot in law or equity deprive him of the right he has acquired in the property. Moreover the allegation in the plaint is that the purchase was made through the father and guardian of the plaintiff, and in the receipt for earnest money granted by the vendors, which has been produced by the plaintiff, it is stated that the purchase was made by Narain Das (the plaintiff's father and guardian) and that he would pay the balance of price. If this document is genuine, the purchase was made by the plaintiff's father for him and he would be liable for the purchase-money. No question of non-payment of such money therefore arises. In *Muniya Konan* v. *Perumal Konan* (1) two learned Judges of the Madras High Court observed that "it cannot be denied that a person may purchase property and hold it as trustee for a minor. There is no reason why he should not create a trust by purchasing it in the name of the minor. No contractual obligations are undertaken by the minor in such a case. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor." These remarks are applicable to the circumstances of this case. It cannot be said that the vendor would be in a worse position than the vendee and would be without remedy for the realization of the purchase-money.

For the reasons stated above we hold that the present suit is not one for the specific performance of a contract and no question of mutuality arises; that a minor is competent to purchase property; and that if the sale-deed relied upon by the plaintiff is genuine he has by virtue of it acquired a title to the property sold and is entitled to maintain the suit.

(1) (1911) 24 M. L. J., 382.

1910

NARAIN DAS v. MUSAMMAT DHANIA.

Another ground on which the lower appellate court has decided against the plaintiff is that he has no cause of action against the defendant. This ground is wholly untenable. It is alleged in the 4th paragraph of the plaint that the defendant is in possession of the house claimed and this paragraph is admitted by the defendant in her written statement. There is, therefore, a clear cause of action against the defendant.

We, therefore, allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance for trial on the merits. Costs here and hitherto will be costs in the cause.

WALSH, J.—I agree with the judgement that has been delivered by my brother Mr. Justice BANERJI. Throughout the argument in Court it seemed to me that the contention on behalf of the respondent was right. It was not until my attention was drawn to section 55 of the Transfer of Property Act, that I could see an answer to what I regarded as the unassailable position taken up by the respondent and affirmed by the judgement in the court below. But looking at section 55 and particularly sub-section (3) and sub-section (4) *(b)*, it is quite clear that provision is there made for a non-possessory lien in favour of the vendor; that is to say, by one part of the section, where there has been a failure to pay the whole of the purchase money, he is apparently entitled to withhold the documents of title, and further, where the title to the property has passed to the buyer, he has a charge upon the property for the unpaid purchase-money in the hands of the buyer. That is inconsistent with his withholding possession. Apart from that section, it seemed to me in the particular circumstances of this transaction, that the vendor was in rightful possession, and the vendor being in rightful possession, the purchaser could not obtain possession. Having regard to section 55, I am now satisfied that that view is fallacious and some trouble might have been saved if attention had been drawn to the section during the argument. It is another illustration of the importance of paying attention to the language of the Code. So long as you keep to the Code, you may make a false step but you are not likely to take the wrong road. The result in this particular case and in all such cases, is obviously to inflict what might be described as injustice upon the

1915

NARAIN DAS v. MUKAMMAT DHANIA.

vendor, because it is clear that a minor, under such circumstances as these, would have, and the minor in this particular case had, twelve years within which to exercise his option as to whether he would take possession or not, and during that time the vendor, who would be unable to sue for the purchase-money, would remain in possession of another person's property with certain obligations resting upon him, uncertain as to whether the transaction would ever be completed or not. There are possibly two answers to that. It may be said that a purchaser from a minor must take his chance, inasmuch as the law has set its face against minor entering into any obligations at all. Secondly, it may be presumed to be a somewhat rare occurrence that for a period of no less than two years there should be a purchaser who did not want the property and a vendor who did not want his money. There is probably something behind this case which further investigation will elucidate, and under the circumstances I am not sorry that the result of our decision is that the case goes down to the court of first instance for evidence to be taken on the merits and for the true facts to be investigated. I agree in the order passed.

Appeal allowed and cause remanded.

PRIVY COUNCIL.

PARBHU DAYAL (PLAINTIFF) v. MAHBUL AHMAD AND OTHERS (DEFENDANTS.)*

And another appeal, two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

P C
1915
November, 10, 11. *December*, 14.

Civil Procedure Code, 1877, *section 583—Decree for redemption reversed on appeal—Restitution—Jurisdiction of court to which application for restitution is made to award mesne profits which are not given by appellate court decree—Suit to redeem.*

A mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge, under which, on payment of the sum decreed to the mortgagee, he was put in possession of the mortgaged property, but the mortgagee appealed to the High Court, which increased the amount payable on redemption by a sum which the mortgagor failed to pay, and the mortgagee thereupon applied to the Subordinate Judge for possession and for mesne profits for the period during which he had been out of possession.

Present:—VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMEER ALI.

1915

PARBHU DAYAL v. MANGUL AHMAD.

Held (upholding the decisions of the courts in India) that the Subordinate Judge had power under section 583 of the Code of Civil Procedure, 1877, to award mesne profits although they had not been expressly given by the decree of the High Court. If the decree was wrong, the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision. The proceedings taken under the decree of the Subordinate Judge culminating in the sale at which the mortgagee purchased the equity of redemption were valid, and the appellant, an assignee of the rights of the mortgagor, was held not entitled to redeem.

Two consolidated appeals 75 and 73 of 1913 from judgements and decrees (9th November, 1909, of the High Court at Allahabad, which partly affirmed and partly reversed judgements and decrees (27th September, 1907,) of the Subordinate Judge of Aligarh.

The main question for decision in these appeals was whether the appellant was entitled to redeem a mortgage, dated the 5th of February, 1863.

The mortgage was a usufructuary one for Rs. 7,700, and was executed by one Ram Bakhsh of his 10 biswa share in a village called Ledhamai in favour of one Debi Das (the predecessor in title of the respondents) who was put in possession, it being agreed that he should take the profits of the mortgaged property in lieu of interest. Ram Bakhsh, on the 28th of June, 1866, sold his equity of redemption in a portion of the property to the sons of one Zahur Ahmad Khan; and another portion in 1871 to Zahur Ahmad Khan himself; and the remainder was purchased by Debi Das, the mortgagee. On the death of Zahur Ahmad Khan in 1873, leaving his sons and several daughters, his sons by their next friend sued in 1877 for redemption of the mortgage (without making the daughters parties to the suit) and obtained a decree in 1878 excluding the small share purchased by Debi Das. The amount found due to the mortgagee was paid to him and he delivered possession of the property to the mortgagor. Debi Das, however, preferred an appeal to the High Court, and the amount to be paid to the mortgagee on redemption was increased on the 2nd of June, 1879, by a sum, which the mortgagors being unable to pay, Debi Das applied in execution of the decree to be restored to possession as mortgagee, which application was granted. Debi Das then applied in execution of the decree for mesne profits for the period for which he had been out of possession,

1915

PARBHU DAYAL v. MARBEL AHMAD.

and he obtained in March, 1881, an order for payment to him of Rs. 3,525 with interest. In August, 1881, the equity of the mortgagors was put up for sale in execution of that order and purchased by Debi Das for Rs. 5,748: the sale was confirmed and a sale certificate was granted to him. In 1886 Debi Das executed a mortgage of his proprietary rights in the village in favour of persons whose heirs brought a suit for sale on the mortgage, and the mortgaged property was sold in 1897, in execution of decree and purchased by Ali Ahmad and Dilsukh Rai (now represented by the respondents). The suits which gave rise to the present appeals were brought for redemption of the mortgage of 1868, the first suit (24 of 1906) by Parbhu Dayal as transferee from the heirs of Zahur Ahmad Khan, and the second suit (173 of 1906) by the heirs of Debi Das; the defendants in both suits being the purchasers of the interest of Debi Das (now represented by the respondents), and the appellant Parbhu Dayal was also made a defendant in the second suit.

Parbhu Dayal's suit was dismissed by the Subordinate Judge; but in the suit by the heirs of Debi Das he made a decree for redemption.

On an appeal in each suit by Parbhu Dayal the High Court (Sir JOHN STANLEY, C. J., and BANERJI, J.) dismissed both appeals with costs.

The judgement of the High Court will be found in the report of the cases in I. L. R., 32 All., 79, where the facts, pleadings, and arguments are fully stated.

On this appeal—

Sir H. Erle Richards, K. C., and *Kenworthy Brown* for the appellants contended that the Court of the Subordinate Judge in execution of the decree of the High Court of the 2nd of June, 1879, had no jurisdiction to make an order or decree for the payment of mesne profits; such an order or decree could only be made under section 583 of the Code of Civil Procedure, 1877, in a case where the applicant was entitled to mesne profits under the decree of the High Court, which was not the case here. The decree of the High Court not only did not award mesne profits; but impliedly negatived the mortgagee's right to them. The order or decree made by the

1915

FAKHRU DAYAL v. MAQBOOL AHMAD.

Subordinate Judge, it was submitted, was without jurisdiction, and made all the proceedings taken on the footing of it invalid and void. Nor had the Subordinate Judge power to order the sale of the equity of redemption for realization of the sum so decreed; and the mortgagee was not entitled to bring the equity of redemption to sale in execution of such decree, and the sale, it was contended, was void being without jurisdiction. Reference was made to section 244, Civil Procedure Code, 1877, and *Kalka Singh* v. *Parasram* (1). The mortgagee, after he had received payment in 1878 of the mortgage debt, retained it and entered into possession again as mortgagee. By purchasing the mortgaged property in execution of a money decree, the mortgagee, it was submitted, could not under the circumstances of the present case get rid of his liability to be redeemed, and notwithstanding his purchase his possession was still that of a mortgagee. *Khairajmal* v. *Daim* (2) was referred to. The daughters of Zahur Ahmad Khan were not parties to, or in any way represented in the suit of 1877, and the sale certificate of the 11th of February, 1882, did not purport to affect their right to redeem, and the appellant was entitled to enforce that right.

De Gruyther, K. C., and *B. Dube*, for the respondents, were not called on.

1915, December 14th:—The judgement of their Lordships was delivered by MR. AMEER ALI:—

The facts on which the two suits that have given rise to the present appeals were brought in the court of the Subordinate Judge of Aligarh, are fully set out in the judgement of the High Court of Allahabad. It is sufficient, therefore, to state shortly the circumstances which form the basis of the appellant Fakhru Dayal's claim. He was the plaintiff in one of the actions (24 of 1906), which was a suit for the redemption of a mortgage, whilst in the other (173 of 1906) he was joined as a defendant. Both suits, however, related to a village called Ladhamau. A half share of this property, in the nomenclature in vogue in this part of the country described as a 10 biswa share, belonged originally to one Ram Bakhsh. In the year

(1) (1884) I. L. R., 22 Calc., 434, L. R., 22 I. A., 68.

(2) (1904) I. L. R., 32 Calc., 296 (312), L. R., 32 I. A., 28 (33).

1863. Ram Bakhsh executed a usufructuary mortgage in respect of this share for a term of eleven and a half years in favour of one Debi Das, since deceased. It may be noted here that just as 16 annas constitute the integral unit in Bengal and other places, 20 biswas form the unit in most parts of Upper India; 20 biswansis going to a biswa. The mortgage deed in favour of Debi Das provided that the mortgagee should remain in undisturbed possession of the mortgaged property and take the rents and profits in lieu of interest. The principal money secured by the mortgage was never repaid and Debi Das continued to hold the share after the expiration of the term for repayment. In the meantime, Ram Bakhsh was dealing with the equity of redemption; in 1866, he assigned his right in 7 biswas of his 10 biswas to the minor sons of a person named Zahur Ahmad; a little later he sold to Zahur Ahmad himself 2 biswas, 19 biswansis, and subsequent thereto the remaining fraction left in his hands to the mortgagee Debi Das. The outstanding equity of redemption in respect of 9 biswas, 19 biswansis thus vested in Zahur Ahmad and his sons. Zahur Ahmad died shortly after, leaving as his heirs, besides his sons, several daughters and two widows. His estate, including the right to redeem the mortgage to Debi Das, accordingly devolved on his heirs. In 1877 his sons under the guardianship of their mother brought a suit for redemption against Debi Das; and in May, 1878, they obtained a decree for possession on payment to the mortgagee of a specified sum. This money appears to have been paid into court, and the plaintiffs obtained possession of the property in July, 1878. The decree of the court of first instance was, however, varied on appeal by the High Court, which directed payment by the plaintiffs of a further sum of Rs. 9,000. This they failed to do, and the mortgagee was restored to possession by an order of the court in April, 1880. Debi Das then applied to the court for an order for mesne profits for the period during which he was out of possession, and in March, 1881, he succeeded in obtaining a decree for a sum of over Rs. 5,000. In execution of this decretal order he caused the outstanding equity of redemption to be attached and sold, and at the auction sale purchased the same himself. After his purchase as aforesaid he purported to deal

1915

PARBHU DAYAL v. SHAFIQ AHMAD

1915

PARBHU DAYAL v. MAKBUL AHMAD.

with the property as absolute owner; he mortgaged the property to one Sagar Mal, who obtained a decree on his mortgage, and in execution of that decree the defendants in suit 173 of 1906 purchased the share in question in 1897. In suit 173 of 1906, which has given rise to appeal 75, the heirs of Debi Das are the plaintiffs, and they seek to redeem the property on the ground that although Debi Das after his purchase in 1881 became the absolute owner, the defendants had in the auction sale held in 1897 only acquired his mortgagee right.

The sons of Zahur Ahmad, on the other hand, continued to deal with their right to the equity of redemption as still subsisting in them, and, by two deeds of sale, assigned to Parbhu Dyal, the appellant, a 5 biswas share of the property. Parbhu Dayal, after failing in one suit in 1905 on the ground of non-joinder of parties, brought in 1906 the present action to redeem the mortgage executed by Ram Bakhsh in 1858 and for ancillary reliefs. He contended in the courts below, as has been contended before this Board on his behalf, that the decree for mesne profits and all the proceedings thereunder, culminating in the sale at which Debi Das purported to purchase the equity of redemption, were made without jurisdiction and conveyed no title to the purchaser; and as they were mere "nullities" the right of his assignors was unaffected, and by virtue of the assignment to him he is entitled to redeem.

Both courts have overruled his contentions and dismissed his suit. Their Lordships fully concur in the reasons given by the High Court for disallowing the plaintiff's claim. As the learned Judges point out, the court which awarded the mesne profits had full jurisdiction in that behalf; if it exercised the jurisdiction wrongly, the persons aggrieved had their remedy under the provisions of the Indian Code of Civil Procedure, either by appeal to the High Court or by an application for revision. Objection was in fact taken under section 311 of the Code of Civil Procedure (1882) to the sale for mesne profits, which was disallowed, and there was no appeal from that order. The present action, in their Lordships' opinion, is wholly misconceived. It was further urged on appellant's behalf that he was at any rate entitled to redeem the share of Zahur Ahmad's daughters, who were no

parties to the suit of their brothers or to the subsequent proceedings held therein. Their Lordships are not satisfied that any right was in fact conveyed to Parbhu Dayal by those ladies, or that if any right was conveyed as alleged what its extent was.

The appeal will be dismissed with costs to be paid by the appellant, Parbhu Dayal, to the respondents who are represented at the hearing.

It is admitted that this judgement will govern appeal 75, which arises out of suit 173 of 1906, brought by the heirs of Debi Das. This appeal will also be dismissed.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondents 1 and 2: *Barrow, Rogers and Nevill.*

J. V. W.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

EMPEROR *v.* BHAWANI DAS *

1915 *December*, 10

Criminal Procedure Code, section 195 (1) (c)—Sanction to prosecute—Offence alleged to have been committed in respect of a document produced in a Civil Court by a party, but before the person prosecuted is held to become a party to any suit.

The words used in section 195 (1) (*c*) "when such offence has been committed by a party to any proceeding in any court" refer not to the date of the commission of the alleged offence, but to the date on which the cognizance of the Criminal Court is invited.

Held when once a document has been produced or given in evidence before a court the sanction of that court, or of some other court to which that court is subordinate, is necessary before a party to the proceedings in which the document was produced or given in evidence can be prosecuted, notwithstanding that the offence alleged was committed before the document came into court, at a time when the person complained against was not a party to any proceeding in court.

Gordhara Marwara v. *King-Emperor* (1), *King-Emperor* v. *Faqir Mahomed Ali Khan* (2) and *Emperor* v. *Lalta Prasad* (3) referred to. *Nur Mahomed Canaan* v. *Kashkaru Manekjee* (4) not followed.

*Criminal Revision No. 813 of 1915.

(1) (1908) 12 C. W. N., 822.
(2) (1905) 8 Oudh Cases, 313.
(3) (1912) I. L. R., 34 All., 604
(4) (1902) 4 Bom. L. R., 288.

1915

EMPEROR v. BHAWANI DAS

THE facts of this case were as follows :—

A sale-deed bearing date the 27th of June, 1913, was executed by some person in the name of one Cheda Lal, by means of which Cheda Lal purported to convey certain property to one Het Ram. On the same date Het Ram executed a mortgage-deed of the same property as security for money borrowed from Bhawani Das. Cheda Lal, stating that the sale-deed was a forgery executed by one Babu Lal, filed a suit in the court of the Subordinate Judge; and Bhawani Das alleging that he had been defrauded by means of the mortgage-deed, likewise filed a suit against Het Ram and Babu Lal. The Subordinate Judge held that the sale-deed was a forgery and that Bhawani Das had been defrauded. He gave appropriate relief to the latter as well as to Cheda Lal, and he took proceedings under section 476 of the Code of Criminal Procedure against Babu Lal and Het Ram. At the sessions trial which followed, Babu Lal and Het Ram were convicted: but the Sessions Judge further issued a notice to Bhawani Das calling upon him to show cause why he should not be prosecuted for abetment, on charges framed under sections 467/471 read with sections 109/114 of the Indian Penal Code. In the meantime, however, Cheda Lal had filed a complaint before a magistrate charging Bhawani simply with abetment of forgery under sections 468 and 109 of the Indian Penal Code. The magistrate took cognizance of this complaint and Bhawani Das thereupon applied to the High Court in revision upon the main ground that the magistrate had no jurisdiction to do so without the sanction of the Subordinate Judge.

Mr. C. Dillon, Maulvi *Shafi-uz-zaman*, Pandit *Shiam Krishna Dar* and Munshi *Benode Behari*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

PRIDEAUX, J.—This is an application in revision against the order of a magistrate taking cognizance of a complaint filed by by one Cheda Lal, against the applicant Bhawani Das. The offence alleged against the latter is abetment of the forgery of a sale-deed, dated the 27th of June, 1913, whereby Cheda Lal purported to convey certain property to one Het Ram. On the same date Het Ram executed a mortgage-deed, whereby he purported

1915

EMPEROR v. BHAWANI DAS

to borrow money from Bhawani Das on the security of this very property. Cheda Lal's case is that he knew nothing about the sale-deed, and that his signature to the same was forged by one Babu Lal. The question was raised in two separate suits filed in the court of the Subordinate Judge, one by Cheda Lal and one by Bhawani Das. The latter did not affirm the disputed sale-deed to be genuine, but on the contrary claimed damages from Babu Lal and Het Ram for having defrauded him. The Subordinate Judge held that the deed was a forgery and that Bhawani Das had been defrauded. He gave appropriate relief to the latter as well as to Cheda Lal, and he took proceedings under section 476 of the Code of Criminal Procedure against Babu Lal and Het Ram. At the Sessions trial which followed Bhawani Das appeared as a witness for the prosecution. Babu Lal and Het Ram were convicted; but the Sessions Judge could not have been satisfied with the evidence given by Bhawani Das, for he issued a notice calling on the latter to show cause why he should not be prosecuted for abetment, on charges framed under sections 467/471 read with sections 109/114 of the Indian Penal Code. In the meantime, however, Cheda Lal had filed a complaint before a magistrate charging Bhawani Das simply with abetment of forgery under sections 463/109 of the Indian Penal Code. The magistrate has taken cognizance of this complaint, and his competence to do so is challenged by the present application.

The question depends on the construction to be put on certain words in section 195 of the Code of Criminal Procedure. The essential words to be considered are:—"No court shall take cognizance . . . of any offence described in section 463 or punishable under sections 471, 475 or 476 of the same (i.e., of the Indian Penal Code) when such offence has been committed by a party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding, except with previous sanction or on the complaint, of such court, or of some other court to which such court is subordinate."

The case for the applicant is that offence alleged against him in the complaint of Cheda Lal is an offence of the kind described in section 463 of the Indian Penal Code; that it was committed in respect of a document produced and given in evidence in the

1915

EMPEROR v. BHAWANI DAS.

court of the Subordinate Judge in two suits to each of which Bhawani Das was a party, and that no sanction has been granted or complaint made by the Subordinate Judge or by the presiding officer of any court to which that of the Subordinate Judge is subordinate. As for the proceedings initiated by the Sessions Judge, they have not yet resulted in any definite order respecting the prosecution of Bhawani Das; moreover, the court of the Subordinate Judge is not subordinate to that of the Sessions Judge.

On behalf of the prosecution it is pointed out that the complaint against Bhawani Das is for abetment of forgery, and that this offence was completed before Bhawani Das became a party to any proceeding in the court of the Subordinate Judge; hence it is contended that it cannot with propriety be described as an offence "committed by a party" to such proceeding. It may be noted further that Bhawani Das is nowhere alleged to have committed any offence punishable under section 471 of the Indian Penal Code in connection with the litigation in the court of the Subordinate Judge. He did not set up the forged sale-deed as genuine in that court, on the contrary, he denounced it as a forgery by which he had himself been defrauded.

With regard to the actual wording of the sub-section under consideration it does seem to me somewhat lacking in precision. To forbid a court to "take cognizance" of an "offence committed by a party" is open to the criticism that no court can decide whether an offence was committed or not, until after it has taken cognizance. It seems necessary, therefore, to read the word "committed," as equivalent to the expression "alleged to have been committed." It then remains to be decided whether the words "by a party to any proceeding" refer to the date of commission of the alleged offence, or to the date on which the allegation brought to the notice of the Criminal Court invited to take is cognizance of such commission.

I am not satisfied that this precise point is covered by any reported decision. The greater part of the case-law which has grown up around section 195 of the Code of Criminal Procedure is devoted to the elucidation of sub-clause *(b)* of clause (1) of the aforesaid section. This relates to certain offences "committed in,

1915

EMPEROR v. BHAWANI DAS

or in relation to, any proceeding in any court," but in sub-clause *(c)*, which is now under consideration, there are no words equivalent to the expression "or in relation to" in sub-clause *(b)*. It would, I think, be easy to refer to a number of cases in which the point now in question has been assumed, or decided by implication, in a sense favourable to the present applicant. I may refer to the case of *Girdhari Marwari* v. *King-Emperor* (1), where it was obviously conceded, on behalf of the prosecution, that a person who first gets a document forged and then institutes a suit upon it, cannot be prosecuted for any offence in respect of the said document without the sanction of the court in which the suit was instituted. I note also the case of *King-Emperor* v. *Raja Mustafa Ali Khan* (2), because this case would seem to have been put forward in the court below on behalf of the prosecution. It seems to me, by implication, strongly in favour of the applicant's contention that sanction is required in the present case. The complaint before the Oudh Court was one of forgery in respect of a document which a Civil Court had declared to be a forgery in a suit instituted by the complainant. The person accused had made no use of the document in the Civil Court; he had in fact declined to defend the civil suit or to produce the document. The plaintiff had obtained his declaration on the basis of a certified copy produced as secondary evidence. The learned Judges held that no sanction was necessary because the document itself had never been produced or given in evidence in the Civil Court; they obviously never thought of holding that sanction was not required because the complaint was in respect of an offence of forgery which had been completed before the accused person became a "party" to the civil suit. There is a Bombay case which is some authority on the other side, namely that of *Noor Mahomed Cassum* v. *Kaikhosru Manekjee* (3). There a certain cheque had been forged and used as genuine in a sale transaction. It was subsequently produced and relied upon as genuine on behalf of the defendant in a civil suit. The successful plaintiff in this suit then filed a complaint against the defendant, not in respect of the forgery of the cheque, nor yet in

(1) (1903) 12 C. W. N., 423. (2) (1905) 8 Oudh Cases, 313.

(3) (1902) 4 Bom. L. R., 268.

1915

EMPEROR v. BHAVANI DAS

respect of the use made of it in the Civil Court, but simply in respect of the use made of it in the sale transaction which preceded the institution of the civil suit. Objection was taken that the Chief Presidency Magistrate could not take cognizance of this complaint without the sanction of the Civil Court. The magistrate clearly thought that his cognizance ought not to be barred, but doubted whether the words of section 195 (1)(c) of the Code of Criminal Procedure were not wide enough to cover the case. He referred to the Bombay High Court the question "whether in the event of an offence punishable under section 471 of the Indian Penal Code being made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a Civil Court, the sanction of such court is necessary under section 195 (1)(c) of the Code of Criminal Procedure before a Criminal Court can take cognizance of such offence." The learned Judges who sat to determine this reference did not discuss the wording of the sub-section, or refer to any authorities. They intimated their opinion that the question referred to them must be answered in the negative, and laid down the general principle that sanction to prosecute for an offence under section 471 of the Indian Penal Code is not necessary in respect of a use made outside the court.

There is one case of this Court which is strongly relied on by the prosecution and has been accepted by the magistrate as sufficient authority for his action in taking cognizance of the Chuda Lal's complaint. This is the case of *Emperor* v. *Lalta Prasad* (1). The facts of that case are not fully apparent from the report, or from the record filed in this Court. I am inclined to think that the magistrate had actually taken cognizance of the alleged offence before the person accused brought the matter into the Civil Court. This is the sense in which the ruling has been understood by Mr. G. P. Boys in his commentary on the Code of Criminal Procedure. I should not feel the slightest hesitation in holding that once a magistrate had taken cognizance of an alleged forgery, the person accused could not be permitted to obstruct his proceedings by filing a civil suit on the basis of the document impeached. Cognizance having been validly taken,

(1) (1913) I. L. R. 35 All. 354.

the magistrate's jurisdiction would not be ousted by subsequent proceedings before a Civil Court. I think, however, that the learned Judge who decided this case was obviously inclined to hold, and did in substance hold, that section 195(1)*(c)* of the Code of Criminal Procedure must be understood as prohibiting only the cognizance of an offence alleged to have been committed by a party to a suit after he became such party.

The present application has in fact been referred to a bench of two Judges in order that the point may be further considered. The interpretation sought to be put on section 195 (1) *(c)*, on behalf of the prosecution in the present case, does not seem to me to follow inevitably from the wording of the section or to be consistent with its apparent purpose. Sub-sections *(a)* and *(b)* of section 195(1) are intended to restrain private individuals from coming forward to demand the punishment of certain offences against the lawful authority of public servants, or the administration of public justice, except under the authority of the public servant or the court of justice concerned. The Legislature has seen fit, in sub-clause *(c)*, to extend the prohibition to a certain limited class of offences not exactly *cusdem generis* with either of the above. Yet it is clear that when a party to a civil suit forges a document for the purpose of that suit and then produces it in support of his claim, he has committed offences punishable under section 193 of the Indian Penal Code, and for these offences he cannot be prosecuted without the sanction of the court. It would be something of an anomaly to maintain this prohibition, and yet to permit a prosecution without any sanction for the graver offences of forgery and of using as genuine of forged document. Moreover, the Legislature doubtless intended to prevent the possibility of any such scandal to the administration of justice as is generally understood to have occurred in the historical case of the prosecution for forgery of the Maharaja Nand Kumar (Nuncomar). It was not considered proper to leave it open to the defendant in a civil suit to carry the question of the genuineness of the plaintiff's document of title before a sheristeh tribunal by instituting a prosecution against the plaintiff alleging him to have forged the same or to have made use of it knowing it to be forged. If the Legislature had seen fit to limit the

1915

EMPEROR v. BHAWANI DAS.

prohibition to the prosecution without sanction of "a party to any proceeding *pending* in any court in respect of a document, etc.," there could have been no serious doubt as to the meaning of the words; but the prohibition would have ceased to be effective as the suit was decided. It may well be that this was considered practically inconvenient, in view of the possible filing of an appeal after a prosecution had been instituted. Or it may have been thought advisable, as already suggested, to make the prohibition, as against parties to a proceeding in a Civil Court, co-extensive with the prohibition in respect of the offence of fabricating false evidence already embodied in section 195 (1) *(b)*. At any rate, I am decidedly of opinion that the Legislature employed the words "an offence committed by a party to any proceeding" with reference not to the date of the commission of the alleged offence, but with reference to the date on which the cognizance of the Criminal Court was invited. The argument that an offence cannot with propriety be said to have been committed by a party to a proceeding on a date anterior to the institution of such proceeding seems to me to lose much of its force when the point is clearly grasped that the expression "offence committed by a party" is loosely used for "offence alleged to have been committed by a party." To my mind the provisions of the sub-section under consideration require to be interpreted as applying to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described as "a party to any proceeding in any court" in which the document in question has been produced or given in evidence, that is to say, who is or has been a party to such proceeding. It does not appear to me that this interpretation does any real violence to the language of the sub-section and I am confident that it is in accordance with the general practice of the courts.

The only case about which I have felt any difficulty is the Bombay case of *Noor Mahomed Cassum* v. *Kavkhosru Manekjee*, (1) to which I have already referred. The decision in that case is unsupported by reasoning, and it is impossible to say with certainty what view the learned Judges intended to take of the

(1) (1902) 4 Bom. L. R., 268.

1915

EMPEROR v. BHAWANI DAS

provisions of section 195 (1) *(c)* of the Code of Criminal Procedure as a whole. I feel the strongest possible doubts as to whether they would have accepted the general proposition contended for on behalf of the prosecution in the present case. Had they taken this view they might well have informed the Chief Presidency Magistrate that no offence anterior in date to the institution of a certain proceeding could with propriety be said to have been committed by a party to that proceeding. I am inclined to the opinion that they had present to their minds some such analogy as I have myself suggested between the prohibition with regard to the manufacture or use of false evidence in sub-section (1)*(b)* and the extension of that prohibition to major offences in sub-section (1)*(c)*. They were trying to distinguish between offences committed by "a party to any proceeding" in respect to the said proceeding and any offence which he may have committed in the course of a transaction wholly independent of that proceeding. Personally I doubt if the case was rightly decided, and I am inclined to the opinion suggested by the Chief Presidency Magistrate, that the wording of section 195 (1)*(c)* was "wide enough" to cover even the case which was then before the court. If it were attempted to apply any such distinction to the facts of the present case, then the necessity or otherwise for sanction would have to depend on whether or not the prosecution was in a position to prove that Bhawani Das, at the time when he abetted this forgery, intended that the document should be produced or given in evidence in the subsequent civil suits. The distinction seems to me too fine for practical application and to involve reading into the provisions of sub-section words which are not there.

I would therefore allow this application and set aside the order of the magistrate taking cognizance of the complaint filed by Cheda Lal.

TUDBALL, J.—I concur.

BY THE COURT.—The application is allowed and the proceedings against Bhawani Das in the magistrate's court are quashed.

Proceedings quashed.

APPELLATE CIVIL.

1915
December, 20.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BASDEO RAI (DEFENDANT) v. DWARKA RAM AND ANOTHER (PLAINTIFFS) *

Act No. IV of 1882 (Transfer of Property Act), sections 105 and 107—Agreement to let land on payment of annual rent—Construction of building in reliance on agreement—Licence—Remedy of licensee for wrongful eviction.

The defendant's father gave the plaintiffs permission to build a *gola* or market place on a certain plot of land, the latter agreeing to pay Rs. 6 a year by ground rent; but no lease was executed. The plaintiffs began to build the *gola*, but before it was finished they were evicted by the owner of the land. *Held* on suit by the plaintiffs for possession and for an injunction to prevent the defendant from interfering with the *gola*, that the plaintiffs were not lessees but merely licensees, and that their remedy, if any, was by way of a suit for damages for the wrongful eviction and not therefor.

THE facts of this case were as follows:—

The father of the defendant appellant Basdeo Rai, a minor, gave the plaintiffs permission to build a *gola* or market place on a certain plot of land on the latter agreeing to pay him Rs. 6 annually as ground-rent for the same. The plaintiffs thereupon built the *gola*, but very shortly afterwards a dispute arose between the parties. The defendant's father interfered with the collection of the income of the *gola*, and finally the plaintiffs were dispossessed towards the end of April, 1913. They brought the present suit for possession and for an injunction to restrain the defendant from interfering with the construction of the *gola* and the collection of the income thereof. It was evident from the plaint itself that the construction of the *gola* had not been finished when the dispute arose. The two lower courts decreed the plaintiffs' suit for possession and for an injunction.

The defendant appealed to the High Court.

Mr. M. L. Agarwala (with him Munshi *Harnandan Prasad*), for the appellant:—

The agreement forming the basis of the plaintiffs' title is in the nature of a lease as defined by section 105 of the Transfer of Property Act, and as it reserved a yearly rent, it ought to have been in writing and registered both under the Transfer of Property

* Second Appeal No. 1323 of 1914, from a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 10th of July, 1914, confirming a decree of Ajaib Husain, Munsif of Ballia, dated the 31st of March, 1914.

1915

BAIDYO NAT v. DWARKA RAM.

Act and the Registration Act. In the absence of a registered instrument an oral authority confers no title, and as the plaintiff is admittedly out of possession, he is not entitled to maintain the suit.

Pandit *Uma Shankar Bajpai*, for the respondent :—

The present objection of the appellant was taken only at a very late stage in the lower appellate court, and as the equities are in favour of the plaintiff, the objection should not be allowed. The agreement may amount only to a licence, but as the plaintiff has executed a work of a permanent character and incurred expenses in the execution, the licence is irrevocable under section 60 of the Easements Act. If the agreement is held to be a lease, then the defendant is estopped from questioning the validity thereof, inasmuch as he has allowed the plaintiff to take possession of the land and to build upon it. The plaintiff is not trying to prove the contents of any agreement.

Mr. M. L. Agarwala, was not heard in reply.

TUDBALL and WALSH, JJ. :—The facts of the case out of which this appeal has arisen are briefly as follows :—The father of the defendant appellant, Baidyo Nat, who is now a minor, gave the plaintiffs permission to build a *gola* or market place on a certain plot of land, on the latter agreeing to pay him Rs. 6 annually as ground-rent for the same. The plaintiffs thereupon built the *gola*, but very shortly afterwards a dispute arose between the parties. The defendant's father interfered with the collection of the income of the *gola* and finally the plaintiffs were dispossessed towards the end of April, 1913. They brought the present suit for possession and for an injunction to restrain the defendant from interfering with the construction of the *gola* and collection of the income thereof. It is evident from the plaint itself that the construction of the *gola* had not been finished when the dispute arose. The courts below have decreed the plaintiffs' suit for possession and injunction. The defendant comes here on second appeal, and the point taken on his behalf is that the plaintiffs have failed to establish any title, in that no document was executed, much less registered and that a lease can only be created in the manner laid down in section 107 of the Transfer of Property Act. Section runs as follows :—"A lease of immoveable property from

1915

BASDEO RAI v. DURGHA RAM.

year to year or for any term exceeding one year or reserving a yearly rent can be made only by registered instrument." It is urged, therefore, that the plaintiffs having no title ought not to have a decree for possession and the suit should be dismissed. This contention appears to us to be well-founded. On behalf of the respondent it is urged that this plea was not taken in the court of first instance and only in the lower appellate court at a fairly late stage; but the plea was accepted and discussed in the court below. There is nothing to prevent the appellant from taking the point in this court. It is further urged that they are not lessees but licensees; that no lease was given to them, that they have erected a building of a permanent nature on the land, that their licence is irrevocable and that therefore they are entitled to possession. In the alternative it is pleaded that the defendant appellant is estopped from denying the plaintiffs' right of possession as lessees over the land. It seems to us fairly clear from the language of sections 52 and 64 of the Indian Easements Act that, even if the plaintiffs respondents be mere licensees whose licence has been improperly revoked, their remedy lies not in a suit for possession, but in a suit for damages as laid down in section 64, as a licensee is a person without any title and has no interest in the land. It is impossible to separate the building from the land, and his remedy as a licensee is clearly to recover damages for the wrongful act of the licensor. In regard to the question of estoppel reliance is placed on the decision in *Muhammad Musa* v. *Aghore Kumar Ganguli* (1). The facts and circumstances of that case are totally different from those of the present case and it is impossible to apply that ruling to the circumstances of the case which is now before us. Moreover, on the plaintiffs' own showing, no term whatsoever was fixed in the agreement between the parties. It is impossible to say for what term we should have to hold that there was a binding agreement between the parties. If the defendant appellant be estopped from denying the existence of the lease, at least the terms of that lease should be before us. Apparently the parties went about the transaction in a careless manner. They were probably friendly at the time and the dispute arose subsequently. An agreement was made to pay an annual rent, but no

(1) (1915) 18 A. L. J., 229.

attempt was made to fix the period. It seems to us fairly clear that the plaintiffs have misconceived their remedy, and that they ought to have brought a suit to recover damages for the wrongful revocation of the licence. They cannot claim as lessees for the simple reason that no lease in law was created. We must allow this appeal and set aside the decrees of the courts below. The plaintiffs' suit will stand dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Walsh.

GULZARI LAL (PLAINTIFF) *v.* LATIF HUSAIN (DEFENDANT).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 182 and 180—Suit for rent—Second appeal to District Judge—Remand—Appeal—Civil Procedure Code (1908), *order XLI, rule 23.*

Held that no appeal lies from an order of remand under order XLI, rule 23 of the Code of Civil Procedure made by a District Judge on an appeal in a suit for rent under section 180, clause (2) of the Agra Tenancy Act, 1901.

1910

January, 3.

IN a suit for rent under the Agra Tenancy Act, 1901, the first court (Assistant Collector of the second class) decreed the claim. The defendant appealed to the Collector, who upheld the decree. A second appeal was preferred to the District Judge under the provisions of section 180 (2) of the Agra Tenancy Act, 1901. The District Judge remanded the case through the court of first appeal to the court of first instance for decision in view of certain remarks made in his judgement. From this order of remand the plaintiff appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondent.

TUDBALL and WALSH, JJ. :—This is an appeal from an order of remand passed by a District Judge in a simple suit for rent. A preliminary objection is taken that no appeal lies to this Court. The suit was instituted in the court of an Assistant Collector of the second class and was decreed. An appeal was preferred in the court of the Collector of the district which upheld the decree. A second appeal was preferred to the District Judge under the provisions of section 180, clause (2). The learned District Judge has remanded the case through the court of the first instance for decision in view of certain remarks made by the District Judge in his

* First Appeal No. 131 of 1909, from an order of Babu Jogindra Nath, Assistant Judge of Farrukhabad, dated the 21st of April, 1909.

1916

GULZARI LAL v. LATIF HUSAIN

judgement, Act II of 1901, section 175, clearly lays down that "no appeal shall lie from any decree or order passed by any court under this Act except as hereinafter provided." Appeals from District Judges' decisions are governed by section 182, which allows only second appeals to this Court from a decree in appeal of a District Judge in accordance with the provisions of Chapter XLII of the Code of Civil Procedure (Act XIV of 1882). In view of the above section and of the provisions of section 193, clause *(a)* it is quite clear that no appeal lies to this Court from the order of remand passed by the court below. The preliminary objection must, therefore, prevail and the appeal is rejected with costs.

FULL BENCH.

1916

January, 4

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

IN THE MATTER OF A PLEADER *

Act No XVIII of 1879 (Legal Practitioners Act), section 14—Level practitioner—Prosecution ordered—Certificate not to be cancelled until result of prosecution is known—Practice.

Where a District Judge, having the discretion to take action against a pleader practising in his judgeship under section 14 of the Legal Practitioners Act, 1879, or to initiate criminal proceedings against him, takes the latter, he ought to wait until the result of the criminal proceedings is known before refusing to renew the pleader's certificate.

THE District Judge of Meerut having reason to suppose that a pleader practising in his judgeship had committed an offence in connection with two suits, which had come before him in appeal and in which the pleader was plaintiff, ordered the pleader to be prosecuted under section 209 of the Indian Penal Code. In the suits there were second appeals to the High Court, and the criminal proceedings were suspended pending the result of these appeals. Meanwhile the pleader's certificate came before the District Judge for renewal. The District Judge refused to renew the certificate. The pleader thereupon preferred the present application to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the applicant.

Babu *Lalit Mohan Banerji*, for the Crown.

* Civil Miscellaneous No 154 of 1915.

1916

IN THE MATTER OF A PLEADER

RICHARDS, C. J., and TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is an application by a pleader whose certificate the learned District Judge of Meerut refused to renew in December last. It appears that the gentleman in question instituted two suits for pre-emption based on Muhammadan law. The court of first instance decided in his favour and granted him a decree. On appeal before the learned District Judge the decision of the Munsif was reversed after the plaintiff (who is the present applicant) had been recalled as a witness and examined. The right of the plaintiff to pre-empt the property, provided he observed the requirements of the Muhammadan law, does not seem to have been disputed. The learned District Judge having dismissed the suits took action under section 476 of the Code of Criminal Procedure, with the result that proceedings have been instituted against the applicant under section 209 of the Indian Penal Code, a section which makes it a criminal offence for a person to make in a court of justice a claim which he knows to be false *with intent to injure or annoy another person*. All this happened in February, 1915. Two appeals against the decision of the learned District Judge in the pre-emption suits are now pending in this Court. Apparently the prosecution under section 209 has been suspended pending the decision of these appeals. Upon the usual application being made by the pleader for the renewal of his certificate the learned District Judge passed an order in these words: "renewal refused." The present application is made to us in consequence. On the 23rd of December, 1915, the learned District Judge reported to this Court that he had refused to renew the certificate thinking that the pleader was not a proper person to whom a renewal should be granted. It seems to us that the action of the learned District Judge has been somewhat inconsistent. All the information as to the character of the pleader whilst the learned District Judge had before him in December, when he refused to renew his certificate, was before him in February, 1915. Two courses were then open to him: either he might (as he did) direct a prosecution, or he might have proceeded under section 14 of the Legal Practitioner's Act. Having directed a prosecution, it seems to us clear that he ought to have waited until the determination of the criminal prosecution before he took any other step which

1916

IN THE MATTER OF A PLEADER.

would have the effect of suspending or dismissing the pleader from practice. By his order refusing to renew the certificate the learned District Judge has in effect found the pleader guilty before he has been tried. Notwithstanding the alleged misconduct by the pleader he has been practising from February, 1915, to the end of the year. We think that the pleader should not be suspended under the circumstances of the present case until the result of the criminal prosecution is made known. We accordingly direct the learned District Judge to renew the certificate of the pleader in question. After the criminal trial, if necessary, and in the event of a conviction, the matter can be reported to the High Court for orders.

Order quashed.

APPELLATE CIVIL.

1916

January, 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

NAUBAT RAI AND ANOTHER (DEFENDANTS) v. BHAUNKAL SINGH (PLAINTIFF) AND SHEORAJ SINGH AND ANOTHER (DEFENDANTS).*

Act No. I of 1877 (Specific Relief Act), section 27—Sale—Suit for specific performance of contract to sell, defendants having undue notice of a registered sale-deed—Priority—Act No. XVI of 1908 (Indian Registration Act), section 50.

The owners of a village which had already been sold at an auction sale in execution of a decree agreed to sell it to the plaintiff, provided that the auction sale should be set aside. The auction sale was set aside; but subsequently the village was sold by means of a registered sale-deed to a third party. *Held*, on suit by the plaintiff for specific performance of the contract to sell to him, that the defendants vendees' registered sale-deed did not take priority over the contract in his favour and that it lay on the defendants to rebut the evidence given by the plaintiff to the effect that the defendants at the time of their purchase were aware of the existence of the contract in favour of the plaintiff.

THE facts of this case were as follows :—

The plaintiff alleged that there was a contract, dated the 24th of December, 1910, between him and the owners of a certain village that the village should be sold to him, if a sale of the same in execution of a decree could be set aside; that the auction sale had been set aside, but that the owners, contrary to the agreement with him, had subsequently, on the 26th of July, 1912, sold the

* First Appeal No. 411 of 1913, from a decree of Rama Das, first Subordinate Judge of Aligarh, dated the 27th of August, 1913.

1916

NAUBAT RAI v. DHAUNSAL SINGH

property to Naubat Rai and another, defendants, and that they had purchased with knowledge of the prior agreement with him. The plaintiff sued for specific performance of the agreement made with him.

The vendees defendants denied all knowledge of the contract between their vendors and the plaintiff; they stated that there was no real intention to sell the property to the plaintiff, the object of the agreement having been to facilitate the obtaining a bid of the auction sale on the ground of inadequacy of consideration, and further pleaded that the property having already been sold in execution of a decree on the date of the contract, viz., the 24th of December, 1910, the vendors on that date had no saleable interest left in the property about which they could enter into a valid contract. The court below decreed the suit. The defendants vendees appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru* (The Hon'ble Dr. *Sir Sundar Lal* and Mr. *Jawahar Lal Nehru*, with him), for the appellants:—

The plaintiff having come into court on the allegation that the defendants appellants had knowledge of the agreement with him the burden of proof lay on him to establish that allegation by affirmative evidence. If no evidence were given at all the plaintiff undoubtedly would fail. The appellants cannot be expected to prove the negative. If the only proof in the case consist of two deeds, then, since the deed of the vendors is registered, while that of the plaintiff (the agreement to sell) is unregistered, the court will have to give effect to the registered deed. *Chennappa Reddi* v. *Manickavasagam Chetti* (1), *Bhalu Roy* v. *Jakhu Roy* (2), *Harnandan Singh* v. *Jawad Ali* (3) and *Kadar* v. *Ismail* (4). The suit ought to have been dismissed, inasmuch as the plaintiff's evidence about the presence of the appellants at the time when the agreement between him and the vendors had been entered into was disbelieved.

Mr. *E. E. O'Conor*, (Munshi *Gulzari Lal*, with him), for the respondents, was not called on.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—The question arises out of a suit for specific performance of a contract alleged to have

(1) (1902) I. L. R., 25 Mad., 1.
(2) (1885) I. L. R., 11 Calc., 667.
(3) (1889) I. L. R., 12 Calc., 407.
(4) (1886) I. L. R., 9 Mad., 249.

1916

NAUBAT RAI v. DHANNAL SINGH.

been made by the defendants Nos. 1 and 2 in favour of the plaintiff. The alleged contract is dated the 24th of December, 1910. It was for the sale of a village called Bimpur Khurd for the price of Rs. 21,000. As part of the consideration the purchaser was to be entitled to set off the amount due for principal and interest upon a certain promissory note, dated the 15th of December, 1910. It appears that the village had already been sold in execution of a decree against the vendors, and the sale was conditional upon this auction sale being set aside. The auction sale, we may here mention, was subsequently set aside under a compromise. In the court below defendants Nos. 1 and 2 pleaded that there was no real intention ever to sell the property to the plaintiff, but that the document (which admittedly was executed) was merely for the purpose of strengthening the application to set aside the auction sale on the ground of inadequacy of price. The defendants Nos. 3 and 4 (who are appellants here), pleaded that they were *bond fide* purchasers without notice under a sale-deed, dated the 26th of July, 1912. They further pleaded that, inasmuch as at the time of the alleged contract with the plaintiff the property had already been sold by auction sale, the contract was void. The court below has found that there was no solid foundation for the plea of the defendants Nos. 1 and 2. They have not appealed and there is now no controversy on the question of the genuineness of the contract of sale made in favour of the plaintiff. The court below has found that Naubat Rai and Nek Ram were aware of the sale to the plaintiff and has accordingly decreed the plaintiff's claim. In appeal it has been urged that the evidence of knowledge of the defendants is unreliable and unsatisfactory. It is further urged that having regard to the provisions of section 50 of the Registration Act the registered sale deed in favour of the appellants must have preference over the unregistered contract in favour of the plaintiffs and that the onus lay upon the plaintiff of showing that the appellants had knowledge of the contract of sale. There is evidence on the record that Naubat Rai (who had the sale carried out on behalf of himself and his co-purchaser) was actually present at the time the contract in favour of the plaintiff was made and executed. Apart from this it appears that Naubat Rai has two brothers, Banke Lal and Gulzari Lal. They all three live together.

Banke Lal is the patwari of the very village which was sold. It has been sworn to by a witness that not only Naubat Rai but this man Banke Lal was present at the time that the contract of sale was made in favour of the plaintiff. It is almost certain that Banke Lal knew of the contract. Banke Lal was not produced. There can be little doubt that these circumstances weighed very much with the courts below when it came to its decision that Naubat Rai and his co-purchaser knew of the contract in favour of the plaintiff. It is of some importance to consider the point of law raised by the appellants. No doubt if the onus lay on the plaintiff of showing that Naubat Rai and Nek Ram were aware of the sale, and if we were confined to a consideration of the oral evidence, and had to disregard surrounding circumstances and probabilities, the case might present some difficulty. It seems to us, however, that the contention of the appellant that their sale-deed must be preferred to the unregistered contract in favour of the plaintiff has no force. Section 50, clause (1), of the Registration Act of 1908, no doubt, provides that a document duly registered takes effect against every unregistered document relating to the same property whether such unregistered document be of the same nature as the registered document or not. But clause (2) expressly provides that the section shall not apply to any document mentioned in sub-section (2) of section 17 of the Act. One class of "document mentioned in clause (2) of section 17" is "any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of Rs 100 and upwards to or in immoveable property: but merely creating a right to obtain another document which will, when executed, create, declare, assign limit, or extinguish any such right, title, or interest." It seems to us that this class includes a contract for sale. If then the provisions of section 50 (1) of the Registration Act have no application, we have to look to section 27 of the Specific Relief Act to see what are the rights of the parties. That section provides as follows: "except as otherwise provided by this chapter specific performance of a contract may be enforced against *(a)* either party thereto, *(b)* any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract."

1916

NAUBAT RAI v. DHAUNAL SINGH.

It seems to us that, regard being had to the provisions of this section the *onus* lay upon the appellants to show that they had no notice of the contract in favour of the plaintiff. Having regard to the evidence in the case and the surrounding circumstances, we have no doubt whatever that the appellants (or at any rate Naubat Rai who acted for himself and his co-purchasers) were fully aware of the contract for sale in favour of the plaintiff. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1916

January, 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

NAJM-UN-NISSA BIBI (PLAINTIFF) v. AMINA BIBI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *section* 109—*Appeal to His Majesty in Council*—"*Substantial question of law*"—*Position of holder of certificate under the Succession Certificate Act*, 1889.

Held that the nature of the legal position of a person who has collected the debts of a deceased person by virtue of his being the holder of a succession certificate granted under the provisions of the Succession Certificate Act, 1889, is a substantial question of law such as would support the granting of special leave to appeal to His Majesty in Council.

THE facts of this case were as follows:—

One Shaikh Minnat-ullah died leaving his widow, Musammat Najm-un-nissa, the plaintiff appellant, and his father, Khadim Husain, as his heirs. Subsequently Khadim Husain died leaving the defendants respondents as his heirs. Under a mortgage-deed dated 14th February, 1891, Nasrat-ullah and Musammat Karamat Bibi had borrowed Rs. 7,206 from Minnat-ullah. After the death of Khadim Husain, the first defendant, Musammat Amina Bibi, his widow, obtained a succession certificate in regard to this debt due from the mortgagors, and together with the other defendants brought a suit for sale of the property mortgaged, making Musammat Najm-un-nissa a defendant to that suit. A decree for sale was obtained and in execution of that decree the mortgaged property was sold and purchased by the decree-holders on the 21st of May, 1906, and the sale was confirmed on the 15th of June, 1906. Musammat Najm-un-nissa brought this suit for recovery of one-fourth of the decretal amount together with interest on the

* Application No. 17 of 1915, for leave to appeal to His Majesty in Council.

1916

NAJM-UN-NISSA BIBI v. AMINA BIBI.

1st of June, 1912, and she prayed in the alternative for possession of a fourth share of the property purchased by the decree-holders. The Subordinate Judge gave the plaintiff a simple money decree disallowing a part of the claim for interest. On appeal by the defendants, the High Court holding that the suit was governed by article 62 of the first schedule to the Limitation Act and having been brought more than three years after the right to sue accrued to the plaintiff was barred by limitation, dismissed the suit. (The case is reported in I. L. R., 37 Allahabad, p. 233.)

The plaintiff applied for leave to appeal to His Majesty in Council.

Maulvi *Iqbal Ahmad*, for the applicant:—

One of the questions involved in the case is as to what is the position of a person who obtains a succession certificate and realizes the debts due to a deceased person, *qua* the other heirs of the deceased who are also entitled to a share in the debt so realized. It is submitted that he is in the position of a trustee and a suit against him for recovery of the shares of the other heirs in the debt realized by him is not barred by any length of time. He referred to section 25 of Act VII of 1889 and to the case of *Prankisto Biswas* v. *Nobodip Chunder Biswas* (1). In any case article 120 of the first schedule to the Limitation Act and not article 62 of the said schedule will govern such a suit. Though the valuation of the suit is below Rs. 10,000, it is submitted that the appeal involves a substantial question of law and one of general importance.

The Hon'ble Dr. *Sundar Lal*, (with him the Hon'ble Mr. *Abdul Raoof*), for the respondents:—

The suit is governed by article 62 of the first schedule to the Limitation Act; *Abdul Ghaffar* v. *Nur Jahan Begam* (2). Section 10 of the Limitation Act applies to express trusts as distinguished from trusts arising by implication of law and from resulting and constructive trusts. Moreover, the implied trust alleged by the plaintiff was not created for any specific purpose and section 10 of the Limitation Act was not applicable. Again,

(1) (1882) I. L. R., 8 Calc., 868.
(2) (1914) I. L. R., 37 All., 484.

1916

NASIM-UN-NISSA BIBI v. AMINA BIBI

the question involved in this appeal is neither a substantial question of law nor one of general importance.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This is an application for leave to appeal to His Majesty in Council. The value of the suit in the court below was under Rs. 10,000 and the value of the proposed appeal is also under Rs. 10,000. This Court did not affirm the decree of the court of first instance. It is still, however, necessary to consider whether or not the case is a fit one for appeal to His Majesty in Council. The case is reported in I. L. R., 37 All., 254. The question of law involved is as to the legal position of a person who has collected the debts of a deceased person by virtue of his being the holder of a succession certificate granted under the provisions of the Succession Certificate Act, Act VII of 1889. This Court held that a suit by one of the persons entitled to a portion of the estate was barred by limitation, applying article 62 of the Limitation Act. On behalf of the appellant it is contended that the holder of a succession certificate to collect the debts is a trustee for the persons entitled and that the provisions of section 10 of the Limitation Act apply and that even if this is not so, the proper article is article 120 of the Act. There is no doubt that the Succession Certificate Act provides for the granting of the certificate, that the effect of such certificate is that the holder of the certificate can give a good discharge to all the debtors of the deceased and that nothing in the Act shall interfere with his liability to account to the persons beneficially entitled to the estate. We think that a substantial question of law of general public importance as to the status of the certificate holder is involved in the present appeal. We accordingly grant a certificate that the case is a fit one for appeal to His Majesty in Council. We reject the prayer for consolidation.

Application granted.

1916
January, 10

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Tudball

MUHAMMAD SIDDIQ (PLAINTIFF) v. MAHMUD-UN-NISSA BIBI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), order XLI, rule 27—Additional evidence called for by appellate court—Re-examining of witness already examined before the court of first instance.

Held that order XLI, rule 27, of the Code of Civil Procedure, 1908, is not intended to enable an appellate court to recall and re-examine before it a witness who has already been examined and cross-examined before the court of first instance.

THE facts of this case are fully stated in the judgement of the Court. Briefly, and so far as the purposes of this report are concerned, they were as follows:—The plaintiff's suit was for pre-emption, based upon the Muhammadan law. The suit was brought in the Munsif's court, where the plaintiff appeared as a witness and was examined and cross-examined. The Munsif decreed the claim. The defendants appealed to the District Judge who made an order, purporting to be under order XLI, rule 27, for the examination of the plaintiff before him. The plaintiff was accordingly examined by the District Judge, who then proceeded to dismiss the suit.

The plaintiff appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.:—This appeal is connected with Second Appeal No. 239 of 1915. The appeals arise out of suits for pre-emption. Having regard to certain matters which transpired during the litigation, it is necessary to set out the facts at some length. It appears that there were four sales. The first sale was made on the 6th of January, 1913. This was a sale in favour of Muhammad Siddiq (the appellant). The vendor was Musammat Abdul-un-nissa. The second sale was made on the 16th of March, 1913, in favour of Mahmud-un-nissa and Abdul-Wali by Musammat Bashir-un-nissa. The third sale was made on the 11th of October, 1913, in favour of the plaintiff Muhammad Siddiq by Abdul Wali and others. The fourth sale

* Second Appeal No. 238 of 1915, from a decree of L. Johnston, District Judge of Meerut, dated the 4th of February, 1915, reversing a decree of Vishnu Ram Mehta, Munsif of Meerut, dated the 9th of November, 1914.

1911.

MUHAMMAD SIDDIQ v. MAHMUD-UN-NISSA BIBI

was of the 18th of January, 1914, in favour of Mahmud-un-nissa and Abdul Wali by Azmatullah. All four sales were of shares in the same mahal in which none of the vendees were previously co-sharers. The first persons to institute a suit were Musammat Mahmud-un-nissa and Abdul Wali, who sought to pre-empt the sale made in favour of Muhammad Siddiq. In this suit pre-emption was sought of both the sales in favour of the plaintiff. This suit was instituted on the 3rd of January, 1914. It was dismissed by the first court on the 31st of March, 1914. Muhammad Siddiq instituted his suits (out of which the present appeals arise) on the 9th of May, 1914. The suits were decreed by the court of first instance. Muhammad Siddiq based his claim on Muhammadan law. He alleged that, having become a co-sharer by virtue of the sale of the 6th of January, 1913, he was entitled to claim pre-emption against Mahmud-un-nissa and Abdul Wali and that he duly performed the conditions of the Muhammadan law as to pre-emption. In his plaint he did not specify the day when he made his demands, and the defendants in their written statement called attention to this fact, suggesting that particulars were purposely omitted to prevent them being able to meet the plaintiff's case by proper evidence. We may here mention that, whatever foundation there might have been for this suggestion, the defendants, although they had many opportunities, never demanded particulars from Muhammad Siddiq, nor asked the court to order that they should be furnished. On the 28th of October, 1914, after issues had already been framed and after the case had been before the court more than once, Muhammad Siddiq was examined. He there stated all the particulars of his demand, including the day (and the time) on which he received notice of the sale. All the plaintiff's witnesses were examined that day. The defendants had in court six witnesses, but the only witness whom they examined was the defendant Abdul Wali himself. Their other witnesses they exempted. They made no application to the court, even then, to postpone the hearing of the case to enable them to produce evidence to rebut the evidence given on behalf of the plaintiff. The case, however, was, for another reason, postponed until the 6th of November, when arguments were heard; judgement in favour of the plaintiff

was delivered on the 9th of November. The defendants appealed to the learned District Judge, and on the case coming before him he made an order that he required Muhammad Siddiq to be examined "in order to enable him to pronounce judgement." He did not record any reason why additional evidence should be produced. He has, however, in his judgement (which he subsequently delivered) given his reasons for calling Muhammad Siddiq. He there says :—"After reading the records in the two cases and finding that the learned Munsif had largely accepted the evidence tendered to prove the demands in the two cases, because the plaintiff was a respectable pleader practising in his court, yet had not subjected him to any special examination to sift his evidence, I deemed it necessary, under order XLI, rule 27, to enable me to pronounce judgement, to examine Muhammad Siddiq myself."

We have gone through the evidence of Muhammad Siddiq in the court of first instance and we there find that he was examined and cross-examined upon practically all the matters on which the learned District Judge subsequently examined him (or rather cross-examined him).

Order XLI, rule 27, is as follows :—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (*b*) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined. Wherever additional evidence is allowed to be produced by an appellate court the court shall record the reason for its admission."

In numerous cases it has been pointed out how slow the courts ought to be in allowing the production of additional evidence in the appellate court. The cases on the subject will be found in Messrs. Woodroffe and Ameer Ali's work on the Code of Civil Procedure, page 1268. In the present case the witness, as already stated, had been already a witness in the court below, had been examined at some length and cross-examined at great

1916

MUHAMMAD SIDDIQ v. MAHMUD-UN-NISSA BIBI

length. There was no gap in the evidence or new matter about which it was necessary to examine him. The learned District Judge merely cross-examined him on his previous evidence. It seems that Muhammad Siddiq was sitting in court near his pleader, and that the learned District Judge, finding he was there, thought that he might be able to get to the bottom of the matter by cross-examination. We have not the smallest doubt that the learned District Judge's intentions were the best. At the same time we have no hesitation in saying that the provisions of order XLI, rule 27, clause *(b)* were never intended to be exercised under circumstances like those we are now dealing with. Furthermore, the learned Judge seems to have mixed up the evidence in the two pre-emption suits. The property in each of these suits was different, the sales were different and some of the witnesses were different. One may have been true and the other false, or both may have been true and both false. But the cases were separately tried and ought to have been separately disposed of. The view which the learned Judge took in one case appears, practically speaking, to have caused him to reject the evidence in the other case. We think Muhammad Siddiq was prejudiced by the action which the learned Judge took. It was his duty (unless he was justified in calling additional evidence) to decide each case upon the evidence as it stood. The fact that he took upon himself to call Muhammad Siddiq and to cross-examine him seems to have to a large extent led him away from the consideration of the evidence that was already on the record. For example, he seems largely to have forgotten that the plaintiff's evidence in the first pre-emption suit was supported by his brother and one other witness, and, but for the statement of one witness called on behalf of the defence, stood uncontested. There was just as much reason for recalling the other witnesses for the plaintiff for cross-examination as for calling the plaintiff. In fact it would have been much fairer to the plaintiff, if, having recalled the plaintiff for cross-examination, he had recalled all the witnesses. If he had done so, the learned Judge would then have been in a position to judge of the plaintiff's case as a whole rather than on the unfavourable impression produced by the sudden cross-examination of Muhammad Siddiq about matters which had occurred two

years before. In this connection we may add that we think that the action of the learned Judge in calling the plaintiff, was a little calculated to make the latter nervous. The learned Judge's action indicated that he doubted the truth of the plaintiff's evidence. We think that the plaintiff might have felt nervous even if he had in the first instance told the truth. If the learned District Judge had decided the case as a court of first instance, Muhammad Siddiq would have had the right of an appeal to another court. The District Judge was nominally deciding the case as a court of appeal when to a very large extent he was basing his judgement upon evidence which he was taking himself. Under all the circumstances of the case we think that the ends of justice require that we should set aside the order of the learned District Judge. We further think that it would not be fair either to the learned Judge, or to the parties, that this case should be remanded to him for decision. It would mean useless expense and protracted litigation. We, therefore, propose to dispose of the case ourselves.

We have been carefully through the evidence and we see no reason to differ from the view taken by the learned Munsif, who had the advantage of seeing and hearing the witnesses. It is suggested that it is remarkable that the plaintiff waited so long before instituting the suit for pre-emption. One explanation of this would be that if Mahmud-un-nisa succeeded in her suit the plaintiff would have no right of pre-emption and the plaintiff waited till the decision of this suit. It has also been suggested that it was curious that the plaintiff never made written mention of the fact that he had claimed pre-emption under the Muhammadan law and made the demands. If the plaintiff had sent a written communication in which he made no mention of his having complied with the Muhammadan law his letter would be open to the comment that he had not complied. If on the other hand reference was made in such written communication to the claim under the Muhammadan law and the due performance of the *talabs*, it is almost certain that it would have been suggested against him that he wrote the letter *pesh bandi* because he was conscious that he had not made the demands according to Muhammadan law. We do not think that any legitimate

1916

MUHAMMAD SIDDIQ v. MAHMUD-UN-NISSA BIBI.

inference can be drawn against the plaintiff because he did not follow up his demand by a written communication. It is said that he was very vague about the day upon which he heard of the sale by Bashir-un-nissa. If the plaintiff had been making an absolutely false case it would seem pretty certain that he, a pleader, would have made quite sure that there should be no mistake about this when he came to give his evidence. He could safely rely upon his own brother to support him in detail if the brother was willing to support him in a false case. It is true that the plaintiff did not give the exact date, but he fixed it by saying that it was the day his brother told him that the document was being registered. The brother in his direct evidence made some confusion between the execution of the sale and its registration But in cross-examination the matter was cleared up, and the plaintiff's brother distinctly stated that he came to know of the sale by seeing the Registrar and that he then informed his brother. Another point which was suggested was that the plaintiff never made any inquiry as to the price. It is well known that the rules of Muhammadan law as to the making of the different demands are extremely technical. It might well be urged that if before making the demands the pre-emptor began to ask questions about the price the subsequent demand would be bad. The probabilities are that any person making the demands required by the Muhammadan law would be careful to confine himself to the actual demand required. If the pre-emptor happened to be a pleader he might well think that it would be extremely dangerous to make any statement which would lend colour to the argument that the demand was conditional. Furthermore, it must be remembered that if Muhammad Siddiq had found that the price was altogether unreasonable or beyond what he was able to or willing to pay, there would be nothing to prevent him letting the matter drop and not proceeding with his claim for pre-emption. We think that the learned Munsif, who had all the witnesses whom the plaintiff examined and the single witness whom the defendant examined before him, was in a far better position than this Court or any other to decide this question of fact. It is somewhat significant that the defendants withdrew five out of their six witnesses. We agree with the learned Munsif that the demands were made. It remains to consider whether these

1916

MUHAMMAD SHOAIB v. MAHMUD-UN-NISSA BIBI.

demands were sufficient in law. There is no special formula laid down by the Muhammadan law. There cannot be the least doubt that if the plaintiff made the demands, the vendee knew perfectly well to what property the demands related. We think under the circumstances of the present case that so long as the demands were made as deposed to by the plaintiff that they were sufficient to entitle him to maintain the present suit.

We accordingly allow the appeal, set aside the decree of the learned District Judge and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

BISHESHAR AHIR (PLAINTIFF) *v.* DUKHARAN AHIR (DEFENDANT).* 1916

January, 11.

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22*—Occupancy holding —Hindu female in possession at such of occupancy holding—Succession.*

There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed, beyond the ordinary estate of a Hindu female. The Act not having provided for the devolution of the interest in an occupancy holding where it was, at the passing of the Act, in the possession of a Hindu female as such, the rights of the parties claiming such holding on the death of the last female occupant must be ascertained according to the ordinary Hindu Law.

THIS was an appeal under section 10 of the Letter Patent, from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows :—

"The dispute between the parties to this appeal relates to the succession to an occupancy holding. It appears that one Kalwara originally held the land in suit as occupancy tenant. He died more than twenty-four years ago, leaving him surviving two daughters, namely Musammat Dilasi and Musammat Sumitra. Musammat Dilasi died about fourteen years ago, and Musammat Sumitra on the 11th of September, 1913. The defendant appellant is the son of Musammat Sumitra. The plaintiffs are the son and grandson of Musammat Dilasi. They instituted the suit out of which this appeal has arisen in the court of the Additional Munsif of Azamgarh for the recovery of joint possession over this occupancy holding. They alleged that they were entitled to one-half of the holding as they were descended from Musammat Dilasi one of the daughters of Kalwara. The principal plea in defence was that the provisions of Act II of 1901 relating to succession to an occupancy holding barred the

* Appeal No. 60 of 1915, under section 10 of the Letters Patent.

1916

BHAGWAN ARIN v. DOORGADAI ARIN.

claim. The learned Munsif dismissed the claim in favour of plaintiff No. 1 but decreed the claim of plaintiff No. 2. The decree of the learned Munsif was upheld by the lower appellate court. Both the courts proceeded on the ruling in the case of *Dalsari* v. *Mal Chand* (1). In appeal to this Court it is contended that the present case is distinguishable from the case relied upon by the lower courts inasmuch as the right of succession accrued to Beheshar the sister's son plaintiff, after the passing of Act II of 1901. Under the said Act a daughter's son can only succeed if he has been joint in the cultivation of the holding with his maternal grandfather at the time of the latter's death. Beheshar did not base his claim on the allegation that he was joint in cultivation with his maternal grandfather. He based his claim on the Hindu Law of succession and he must therefore succeed in his claim. In support of this contention the learned counsel for the appellant relies upon the case of *Mussamat Sahari* v. *Sajawar* (2). For the plaintiff respondent the contention is that he had acquired some interest in the succession to his maternal grandfather at the time of the latter's death because he could have questioned an alienation by his mother or his aunt or both if any had been made. As he had acquired an interest in the succession prior to the passing of Act II of 1901 the provisions of that Act do not apply to him. I think that this appeal must prevail. The plaintiff respondent acquired his right to succeed on the death of his aunt Mussamat Sahariun on the 14th of September, 1913, that is, after the passing of Act II of 1901. The right of the plaintiff respondent to question an alienation if any made by his mother or his aunt is not the same thing as a right of succession. The claim of the plaintiff respondent must therefore fail in view of the provisions of section 22 of Act II of 1901. The same provisions of course would defeat the title of the defendant appellant also if the zamindar chose to enforce them against him, but that is not at present the question for determination. I allow the appeal, reverse the decree of both the courts below and dismiss the claim of the plaintiff respondent with costs in all courts."

The plaintiff no. 1 appealed.

Munshi *Iqbal Ahmad*, for the appellant:—

As Katwaru died while the old Act was in force, the succession to his tenancy would not be governed by Act II of 1901. The plaintiff is claiming to succeed to Katwaru's tenancy and therefore he would not be subject to the present law. The daughters only took a life interest and were never full occupancy tenants. The ruling relied on by the learned Judge of this Court has not been followed in later Division Bench rulings; *Deoki Rai* v. *Mussammat Parbati* (3) *Natha* v. *Gokulee* (4) and *Sital Prasad* v. *Bishan Dat* (5).

(1) (1910) I. L. R., 32 All., 314. (3) (1914) 26 Indian Cases, 100

(2) (1914) 26 Indian Cases. (4) (1916) I. L. R., 39 All., 688.

(5) (1916) 30 Indian Cases 804.

1916

BISHAMBHAR AHIR v. DUKHARAN AHIR.

Babu *Piari Lal Banerji*, for the respondent :—

Musammat Sumitra was an occupancy tenant within the meaning of that expression as used in the Tenancy Act. She had cultivated the land for more than 12 years and was entitled to the status of an occupancy tenant in her own right. The defendant, as her son, was a male lineal descendant and the plaintiff as sister's son could not succeed according to section 22. The fact that Musammat Sumitra originally entered as a Hindu daughter with a Hindu female's estate, would not prevent her from acquiring occupancy rights herself. Again, a Hindu female succeeding to an occupancy tenancy takes the entire estate. There is no outstanding interest left in anybody and she would therefore appropriately be described, as an occupancy tenant within the meaning of section 22 ; *Bibi Bamidhar* v. *Musammat Rajwantia* (1). On the question of the nature of the estate taken by a Hindu female, see *Vasonji Muraryji* v. *Chanda Bibi* (2). If, however, Sumitra could not be regarded as the occupancy tenant and the plaintiff was entitled to claim through Kanwaru, he would have to satisfy the condition of sharing in the cultivation with him. After the passing of Act II of 1901, no title by inheritance to an occupancy holding can be made out otherwise than under section 22, unless the title was acquired before the passing of the Act, as the Act does not affect vested rights acquired before the Act was passed ; *Dukari* v. *Mul Chand* (3). In the present case the plaintiff acquired his right, if any, in 1913 and consequently he is governed by section 22. It is not possible to have two rules of devolution to occupancy tenancies, viz. one laid down in section 22, and the other the ordinary rule of the Hindu Law of succession.

Maulvi *Iqbal Ahmad*, was not heard in reply.

RICHARDS, C. J., and TUDBALL, J. :—This appeal relates to a suit in which the plaintiff claimed a half share in an occupancy holding. The facts are very simple and are undisputed. Kanwaru was the tenant of the occupancy holding. He died many years ago before the Agra Tenancy Act came into force, leaving two

(1) (1907) Select Decisions of Board of Revenue No. 8.

(2) (1905) I. L. R., 30 All., 676.

(3) (1910) I. L. R., 33 All., 314.

1916

BISHESHAR ARIN v. DURGADAN ARIN.

daughters, Musammat Dilasi and Musammat Sumitra. Musammat Dilasi died about 14 years before the suit was instituted, leaving her surviving, her sister Musammat Sumitra, who died on the 11th of September, 1913. The plaintiffs are the son and grandson of Musammat Dilasi and the defendant is the son of Musammat Sumitra. It is admitted that on the death of Katwaru his two daughters became entitled to possession of the property as Hindu females. According to the provisions of the Rent Act of 1881 an occupancy holding, subject to certain qualifications, descended "as land." It is admitted that if the Agra Tenancy Act had never been passed, the plaintiff No. 1 would be entitled to succeed in the present suit. Section 22 of the Agra Tenancy Act provides that when an occupancy tenant dies his interest shall devolve as therein provided. If we regard Musammat Sumitra as *the occupancy tenant* within the meaning of section 22 of the Tenancy Act the plaintiff's title fails. It seems to us that we cannot regard Musammat Sumitra as the full occupancy tenant. When she and her sister succeeded they succeeded merely as Hindu ladies. There is nothing in the Agra Tenancy Act which enlarges the estate of a Hindu female in an occupancy holding in possession at the time the Act was passed beyond the ordinary estate of a Hindu female. If the Act has not provided for the devolution of the interest in an occupancy holding, where it was, at the passing of the Act, in the possession of a Hindu female as such, we think that we ought to go to the ordinary Hindu law to ascertain the rights of the parties. There has no doubt been some conflict of views upon the point. The important matter is to have a definite ruling one way or the other. The cases, as time goes on, in which the question will arise, must become fewer and fewer. It is said that the Board of Revenue have taken a decided view that a female Hindu is the full occupancy tenant within the meaning of section 22 and the case of *Babu Bansidhar* v. *Musammat Rajwantia* (1) is relied upon. In that case no doubt the view contended for seems to have been taken and the members of the Board seem to have considered that upon the death of a Hindu widow all occupancy rights ceased to exist and were extinguished. In another case

(1) (1907) Select Decisions of Board of Revenue, No. 3.

before the Board of Revenue, *Sital Prasad* v. *Bishan Dat* (1), quite a contrary view appears to have been taken by the Board. This case was decided on the 22nd day of August, 1912. In that case one Rahman had been the occupancy tenant. On his death prior to the passing of the present Agra Tenancy Act his widow Musammat Narain became entitled to possession. She died after the new Act came into force leaving two daughters and a daughter's son. The Senior Member of the Board of Revenue stated in the clearest way possible that upon the death of the widow, who had only been in possession for her life, her daughters became entitled and were then the occupancy tenants. On behalf of the appellants the following cases were relied upon:—*Deoki Rai* v. *Musammat Parbati* (2), *Nathu* v. *Gokalia* (3), *Dulari* v. *Mul Chand* (4). The two first mentioned cases are no doubt clearly distinguishable, and the question which we have to decide in the present case was not decided in *Dulari* v. *Mul Chand*, there was the distinction which has been pointed out by the learned Judge of this Court that the plaintiff's right had already accrued to her before the present Act came into operation and her rights were only postponed by reason of the fact that she was rich while her sister poor. We think that the decisions of the courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court and we direct that the parties do pay their own costs in this Court.

Appeal allowed.

1916

BISHESHAR DAYAL v. DEOKARAN ARIN

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

1916 *January*, 13.

MUHAMMAD KHALIL (PLAINTIFF) v. MUHAMMAD IBRAHIM (DEFENDANT).*

Pre-emption—Muhammadan Law—Talab-i-ishtishhad.

Held that a Muhammadan pre-emptor cannot validly make the *talab-i-ishtishhad* by letter when he is in a position to do so in person.

* Second Appeal No. 699 of 1914, from a decree of D. Dewar, District Judge of Saharanpur, dated the 14th of February, 1914, reversing a decree of Piari Lal, Munsif of Saharanpur, dated the 18th of May, 1912.

(1) (1915) 30 Indian Cases, 805. (3) (1915) I. L. R., 37 All., 653.

(2) (1914) 20 Indian Cases 804. (4) (1910) I. L. R., 32 All., 314.

1916

MUHAMMAD KHALIL v. MUHAMMAD IBRAHIM.

THE facts of the case were as follows:—

The defendant No. 2 sold a house situate in the district of Saharanpur to the defendant No. 1 by a sale deed, dated the 7th of September, 1910. The plaintiff brought the present suit for pre-emption under the Muhammadan law on the ground of his being a neighbour and a partner in the rights of easement of the vendor. The plaintiff alleged that he was an Inspector of Partition Amins of the Bareilly division and used to reside at Bareilly, that while on tour, he heard of the sale at Budaun, on the 14th of October, 1910, and immediately performed the *talab-i-mawasibat* in the presence of witnesses and owing to his being at a distance from the vendee, performed the *talab-i-ishtishhad* by sending a letter by post to the vendee claiming the right of pre-emption and stating that the first demand had been properly made. The letter was written in the presence of witnesses and it was duly received by the vendee. The court of first instance held that both the demands had been validly made, and the suit was decreed. On appeal, the learned District Judge held that the *talab-i-ishtishhad* had not been duly made in the manner required by the Muhammadan law, and the suit was dismissed. The plaintiff appealed to the High Court.

The Hon'ble *Dr. Tej Bahadur Sapru*, for the appellant:—

Under the Muhammadan law *talab-i-ishtishhad* could under circumstances such as existed in the present case, be validly performed by a letter. The plaintiff was in the Government service at a distance from the vendee and the property sold; he could therefore make the demand by letter; *MacNaughten*, Principles and Precedents of Muhammadan Law, p. 183; *Baillie, Muhammadan Law*, p. 489; *Ameer Ali, Muhammadan Law*, Vol. I, 3rd Ed., p. 607; *Wilson, Anglo-Muhammadan Law*, 4th Ed., p. 418; *Syed Wajid Ali Khan v. Lala Hanuman Prasad* (1) and *Ali Muhammad Khan v. Muhammad Said Hasan* (2). The *talab-i-ishtishhad* was required to be made so that the vendee should have notice of the pre-emptor's claim, and the presence of witnesses was necessary to secure evidence of the fact that such notice had been given. Both these purposes were wholly served by sending a written

(1) (1893) 4 B. L. R., A. C., 133. (2) (1893) I. L. R., 18 All., 369.

1915

MUHAMMAD KHALIL v. MUHAMMAD IBRAHIM

notice under registered cover. The rules in the ancient text books prescribing various formalities and technical formulæ for the making of the demands should under the changed and progressive conditions of modern civilization, be liberally construed in a reasonable manner, *Sarabai* v. *Rabiabai* (1).

The Hon'ble Mr. *Abdul Rauf*, for the respondent, was not called upon.

RICHARDS, C. J., and TUDBALL J.—This appeal arises out of a suit for pre-emption based on Muhammadan law. The second demand (*talab-i-ishtishhad*) was made by letter. The lower appellate court has held that this was not a compliance with the Muhammadan law, and has dismissed the plaintiff's suit. On the facts as found there was no reason why the plaintiff should not have made the second demand in person. It is urged, however, in appeal here that under the Muhammadan law as properly understood the pre-emptor has an option and he is entitled, if so he pleases, to make his second demand by letter. In support of this proposition certain learned authors on Muhammadan law have been cited including Baillie, MacNaughten and Ameer Ali. All these authors touch on the question as to how the second demand may be made. But their views are all based upon a text from Fatwa Alamgiri and must be read therewith. This has been translated for us and no exception is taken to the translation. It is as follows:—"If a pre-emptor comes to know of the sale while he is on his way to Mecca and makes the *talab-i-muwasibat*, but is unable to perform the *talab-i-ishtishhad* personally, he ought to appoint a vakil to make the claim of pre-emption for him. If he cannot find anyone whom he may appoint his vakil, but finds a messenger, he ought to write a letter and in this letter he ought to appoint a vakil. If he fails to do so his right of pre-emption will be lost. But if he can neither find a vakil nor a messenger his right of pre-emption will not be lost until he finds one." It is quite clear that the plaintiff was not unable to make these demands himself, nor is there anything to show that he was unable to appoint a vakil. We think the view taken by the court below was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) I. L. R., 30 Bom., 537.

1916
January, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

CHATTAR SINGH (DECREE-HOLDER) *v.* AMIR SINGH (JUDGEMENT-DEBTOR).*

Civil Procedure Code (1908), *order XXI, rule 2—Execution of decree—Decree payable by instalments—Payment of instalments not certified—Limitation—Act No IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 183 (7).

The effect of order XXI, rule 2, is that a payment made on account of a decree and not certified to the court executing the decree cannot be recognized by that court for any purpose. Where, therefore, payments had been made towards liquidation of an instalment decree, but such payments were not certified to the court executing the decree, it was *held* that limitation ran against the decree-holder from the date upon which the first instalment was due.

"Certified and recorded" within the meaning of order XXI, rule 2, signify that the executing court being satisfied by either the decree-holder or the judgement-debtor that a certain payment has been made in respect of "decree has recorded the fact on the execution file. *Gokal Chand* v. *Bhika* (1) and *Bhajan Lal* v. *Cheda Lal* (2) referred to. *Lalchi Narain Ganguli* v. *Falamani Dasi* (3) dissented from

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows:—

"This appeal arises out of an application made on the 12th of November, 1913, for execution of a decree, dated the 16th of May, 1909. The decree was for a considerable sum of money to be paid in certain instalments. The first instalment amounting to Rs. 124 was to be paid at the end of *Aghan*, Sambat 1965, corresponding with the 26th of December, 1909. The second instalment amounting to Rs. 62 was to be paid at the end of *Jeth*, Sambat 1967. Subsequent instalments of Rs 62 each were to be paid at the end of *Aghan* and at the end of *Jeth*, till the whole decree was satisfied. In case of default the whole was to become payable at once. The decree-holders in their application of the 12th of November, 1913, stated that they had received the first four instalments, but that there had been a default in payment of the instalment due at the end of *Aghan*, Sambat 1968, and they therefore claimed the whole amount remaining due under the decree. Payment of the first four instalments was not certified to the court or recorded by the court and therefore cannot be recognized by any court executing the decree. The learned vakil for the decree-holders relies upon a decision of this Court based upon section 258 of the Code of Civil Procedure, 1882, but the words relied upon by the Court as justifying the view that a court might recognize an uncertified payment for some purposes have now disappeared from the Code, with the result that an uncertified payment cannot

* Appeal No. 65 of 1915, under section 10 of the Letters Patent.

(1) (1914) 13 A. L. J., 337. (2) (1914) 12 A. L. J., 825

(3) (1914) 20 C. L. J., 131.

be recognized for any purpose, certainly not for the purpose of saving limitation. The decree in question provides in plain terms that if there is default in payment of any instalment, the whole amount of the decree shall become payable. It has been held in a large number of cases that clause (7) in the third column of article 182 of schedule I to the Limitation Act applies to such a provision as this. The only point on which there is any room for doubt is whether the decree directed payment to be made on a certain date. The decree directs that instalments are to be paid on or before the last day of *Aghan* and *Jeth*, and that if there is default, the whole amount shall become payable at once. This appears to me to bring the case within clause (7), and I hold that the application for execution should have been made within three years of the first default. The decree-holder being unable to prove that any instalments have been paid, I must take it that the first default occurred at the end of *Aghan*, Sambat 1965. Therefore the present application for execution made more than three years after that time is barred by limitation and should have been dismissed. I was referred to a judgement of the Bombay High Court in a case in which the effect of subsequent payments and acceptance of over-due instalments was discussed. It appears to have no bearing on the present case, as it is not suggested that there was acceptance of an over-due instalment or anything in the shape of waiver which would affect the period prescribed by the Limitation Act. I allow this appeal, set aside the order of the court below and dismiss the respondent's application for execution with costs throughout."

The decree-holder appealed.

Babu *Sital Prasad Ghose*, for the appellant :—

Article 182, clause (7), of the Limitation Act does not apply, as the decree under execution did not itself provide for payment of money *on a certain date*. The present case was governed by article 181, and time would begin to run from the date when the right to apply accrued. It was not obligatory on the decree-holder to take out execution after the first default. He might wait and waive the first and subsequent defaults. The right to apply accrued afresh on the each successive default for the amount then due on the decree; *Muhammad Islam v. Muhammad Ahsan* (1) and *Shankar Prasad v. Jalpa Prasad* (2). Then, again, according to the decree-holder, certain instalments had been paid out of court by the judgement-debtor. It was true that such payments had not been recorded as certified by the court. But an uncertified payment can be proved and given effect to for the purpose of saving limitation. Under the old Code of Civil Procedure this was the settled rule so far as this

(1) (1894) I. L. R., 16 All., 237. (2) (1894) I. L. R., 16 All., 371.

1916

CHATTAR SINGH v. AMIR SINGH.

Court was concerned; *Roshan Singh* v. *Mata Din* (1) and *Badri Narain* v. *Kunj Bihari Lal* (2). The altered language of order XXI, rule 2, clause (3), of the Code of Civil Procedure did not touch the point; and could not be taken to nullify the effect of section 20 of the Limitation Act, *Lakhi Narain Ganguli* v. *Fekmani Dasi* (3) and *Rajam Aiyar* v. *Anandharatnam Aiyar* (4). Moreover, the statement in the decree-holder's application for execution of decree as to the payment out of court of certain instalments was in substance a sufficient certificate, within the meaning of order XXI, rule 2, clause (1) of the Code of Civil Procedure, of such payment and should have been acted upon by the court. The decree-holder was at liberty to certify after any lapse of time. There was no time limit fixed for the purpose. Article 174 of the Limitation Act only applied to judgement-debtors and not to decree-holders. *Tukaram* v. *Babaji* (5).

Pandit Mohan Lal Sandal, for the respondent, was not called upon.

RICHARDS, C. J., and MUHAMMAD RAFIQ J.—This appeal arises out of an application made by a decree-holder to execute a decree. In the application for execution the decree-holder stated that the decree was payable by instalments and the first four instalments had been paid, but default had been made in the fifth instalment. He accordingly asked for execution of the decree in respect of the balance still remaining due. The decree was an instalment decree, but provided that if default was made in the payment of the instalments the full amount should become due. The judgement-debtor opposed the application on the ground that the application for execution was barred by time. He denied that payments had been made of any instalments. The court of first instance, after setting forth the facts, states as follows:—"The judgement-debtor contests that the application is time-barred inasmuch as under present Act the court cannot recognize any uncertified payments. The decree-holder, on the other hand, says that the terms of the decree are not imperative and that the decree would be within time assuming the payments referred to were not recognized."

(1) (1903) I. L. R., 26 All., 36.
(2) (1913) I. L. R., 35 All., 178.
(3) (1914) 20 C. L. J., 131.
(4) (1915) 29 M. L. J., 669.
(5) (1897) I. L. R., 21 Bom., 122.

1916

CHATTAR SINGH v. AMIR SINGH.

The court accepted the contention of the decree-holder and disallowed the objection. On first appeal to the District Judge the decision of the court of first instance was upheld. On second appeal to this Court a learned Judge reversed the decision of the lower courts and dismissed the application as barred by time.

The first question for consideration is whether on the assumption that no payments were ever made the decree-holder is entitled to have execution for the remaining instalments. If the first four instalments had been paid, it is quite clear that the application for execution in respect of the remaining instalments would be well within time. The contention, however, of the judgement-debtor is that assuming default was made in respect of the first instalment, the full amount of the decree became payable and that under the provisions of article 182 (clause 7) the application is barred. The decree-holder, on the other hand, contends that he was entitled, if he so pleased, to waive his claim to the earlier instalments and that he was entitled to get execution in respect of the remaining instalments. This was his contention in the court of first instance, which was accepted by the Munsif. It seems to us that this contention is not sound. Undoubtedly (on the face of the decree) it was directed that payment of the full amount should be made when default was made in the payment of any instalment. Therefore under clause (7) of article 182 time began to run from the date when the first instalment became due (we are dealing now with the case upon the assumption that default was made on that date).

It is next contended that the decree-holder ought to have been allowed to go into evidence to show that the first four instalments had been paid out of court. He says that he had his witnesses ready which could and would have been produced if the Munsif had not expressed an opinion that this was unnecessary and that the judgement-debtor's objection was bad for other reasons. It is quite possible that the witnesses were present and that the decree-holder might have given evidence as to the payments of the first four instalments. There is, however, nothing on the record to show that the witnesses were present in court. However this may be, the judgement-debtor's objection has still to be considered.

1916

UTTAMAM SINGH v. AMIR SINGH.

He relies on the provisions of order XXI, rule 2, which is as follows :—

"Where any money payable under a decree of any kind is paid out of court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly."

Clause (3) is as follows :—

"Payment or adjustment which has not been certified or recorded as aforesaid shall not be recognized by any court executing the decree."

The judgement-debtor contends that, even if the witnesses were present in court ready to give evidence, the court could not hear them, inasmuch as the only way in which a payment towards the decree could have been proved was by its being "certified and recorded" according to the rule. As against this contention the decree-holder says that there is no period prescribed by law within which he could certify the payment made on foot of the decree out of court, and that his application for execution in which he says that payments had been made should have been treated as "certifying." The appellant relies upon the case of *Lakhi Narain Ganguli* v. *Felmani Dasi* (1) and upon the case of *Rajam Aiyar* v. *Anantharatnam Aiyar* (2). In the first of these cases the learned Judges say :—

"The decree was obtained so long ago as the 5th of April, 1909, and the application for execution was made on the 17th of December, 1913. Between these two dates on three occasions, as found by the learned Judge of the court below, the judgement-debtor made part payments to the decree-holder, namely, on the 6th of March, 1911, 18th of March, 1912, and 21st of February, 1913. Receipt of each of these payments was endorsed on the back of an office copy of the decree, and thereupon the decree-holders applied on the 17th of December, 1913, for execution for the balance remaining due under the decree."

Later on the learned Judges say :—

"There is no definition of what "certifying" or "recording" is, but it is quite clear that the practice in this country is that

(1) (1914) 20 C. L. J., 181. (2) (1915) 29 M. L. J., 669.

1916

GHATTAR SINGH v. AMAR SINGH.

the decree-holder certified the part payments in the application for execution and thereupon the court having recorded the whole of the petition directs execution to issue for the balance."

We are not prepared to accept this as the practice in these provinces. In our opinion the practice is that when payments are made in court or out of court there is a record on the execution file showing that the payments have been certified and recorded. It would obviously not be within the spirit of order XXI, rule 2, that "certifying" of the payments on foot of a decree should rest entirely with the decree-holder. He might often be tempted to record on his private copy of the decree a part payment which had in fact never been made. We may assume for the purposes of argument that a decree-holder may at any time come in with an application to the court that he should be at liberty to certify a payment and have it recorded, but in the present case there was no such application made by the decree-holder. He merely came in with an application for execution alleging that certain payments had been made. As to what has been the practice of "certifying" payments, we may refer to the case of *Gokul Chand* v. *Bhika* (1), and also to the case of *Bhajan Lal* v. *Cheda Lal* (2). In our opinion no payment on foot of the decree having been "certified and recorded" within the meaning of order XXI, rule 2, the court was bound to assume that no such payments had been made and it was not entitled to go into evidence as to payment on an application for execution of the decree. In this view the decree of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

1916

January, 24.

JAMNA DAS (PLAINTIFF) v. RAM AUTAR PANDE (DEFENDANT).*

Mortgage—Sale of mortgaged property—Purchase money "left with the purchaser for payment to the mortgagee"—Nature of the transaction—Trust

Where a mortgagor sells the mortgaged property and, as it is commonly expressed, leaves part of the price with the purchaser for payment to the mortgagee, the transaction is merely one of sale subject to the mortgage. No

* First Appeal No. 12 of 1914, from a decree of J. B. Mundle, Subordinate Judge of Mirzapur, dated the 30th of August, 1913.

(1) (1914) 12 A. L. J., 337. (2) (1914) 12 A. L. J., 665.

1910

JAMNA DAS v. RAM AUTAR.

trust is created in the purchaser for payment of the portion of the price "left with him" to the mortgagee

THE fact of this case were as follows :—

On the 2nd of June, 1913, one Musammat Lakhpati Kunwar made a mortgage in favour of Jamna Das. The mortgage consisted of zamindari property and also mortgagee rights in other property. On the 24th of November, 1896, Musammat Lakhpati sold the entire mortgaged property, that is to say, the zamindari and the mortgagee rights, to the defendant Pandit Ram Autar Pande for the sum of Rs. 44,000 leaving Rs. 40,000 with the vendee for payment of the money due to Jamna Das. On the 9th of February, 1900, Jamna Das sued for sale of the mortgaged property. After a considerable amount of litigation he got a decree, but only for the sale of the zamindari; the mortgagee rights were excluded. The sale of the zamindari property being insufficient to satisfy the decree, the plaintiff, on the 7th of January, 1907, applied for a decree under section 90 of the Transfer of Property Act, and after some further litigation obtained a decree against the judgement-debtors other than the present defendants.

The mortgagee then brought the present suit seeking to recover from the purchaser of the mortgaged property, Ram Autar Pande, Rs 33,000 out of the Rs. 40,000 which had been "left with him for payment to the mortgagee." The court of first instance dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Dr *Sundar Lal*, and The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit in which the plaintiff Lala Jamna Das claimed the sum of Rs 33,000 together with interest. It appears that on the 2nd of June, 1913, one Musammat Lakhpati Kunwar made a mortgage in favour of Jamna Das. The mortgage consisted of zamindari property and also mortgagee rights in other property. On the 24th of November, 1896, Musammat Lakhpati sold the entire mortgaged property, that is to say, the zamindari and the mortgagee rights, to the defendant Pandit Ram Autar Pande for the sum of Rs. 44,000 leaving Rs. 40,000 with the vendee for

1916

JANNA DAS v. RAM AUTAR.

payment of the money due to Janna Das. On the 9th of February, 1900, Janna Das sued for sale of the mortgaged property. After a considerable amount of litigation he got a decree, but only for the sale of the zamindari; the mortgagee rights were excluded. The sale of the zamindari property being insufficient to satisfy the decree, the plaintiff, on the 7th of January, 1907, applied for a decree under section 90 of the Transfer of Property Act, and after some further litigation obtained a decree against the judgement-debtors other than the present defendant. It is alleged that a balance of Rs. 34,000 still remained due. He now brings the present suit alleging that Pandit Ram Autar Pande was a trustee for him because Rs. 40,000 out of Rs. 44,000 was left in his hands for payment of the plaintiff's debt. There is no doubt that it was due to certain rulings of this High Court that mortgagee rights were excluded from the original decree which Janna Das obtained on foot of his mortgage. Ever since the case of *Ram Shumher Lal* v. *Umesh Pershad* (1) was decided a mortgagee of mortgagee rights (that is, a sub-mortgagee) is entitled to pursue his remedy and realize his debt out of the mortgage security, even though that security be mortgagee rights. In the case we have referred to the authorities were fully discussed and the Court unanimously overruled the case of *Mata Din Kasodhan* v. *Kasim Hussain* (2). The latter decision of this Court is supported by the provisions of order XXXIV. In reality the present suit has been brought because the plaintiff failed to realize his debt in the appropriate way. In our opinion the real nature of the sale of the 24th of November, 1896, was a sale by Musammat Lakhpati to Pandit Ram Autar Pande for Rs. 4,000 subject to the mortgage of Rs. 40,000. In our judgement it is absolutely clear that no trust was created in favour of the plaintiff. He was no party to the transaction and the sale did not in any way affect his rights to proceed against the property mortgaged to him. We consider that the decision of the Court below was quite correct and must be confirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1907) I. L. R. 34 All. 353. (2) (1891) I. L. R. 13 All. 434.

1916
January, 21

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

KARAM ILAHI (DEFENDANT) v. SHARF-UD-DIN (PLAINTIFF), AND NANHEY LAL AND ANOTHER (DEFENDANTS) *

Act No IV of 1882 (Transfer of Property Act), sections 123 and 129—Gift—Validity of gift of immovable property—Muhammadan law.

Where a Muhammadan had made a gift of immovable property which was valid according to Muhammadan law, it was *held* that the gift was none the less valid because the donor had executed a deed of gift purporting to convey the property to the donee, which, owing to a defect in the attestation, was invalid according to the provisions of the Transfer of Property Act, 1882.

THE facts of this case were as follows :—

The plaintiff sued for a declaration that certain property was not liable to be sold in execution of a decree, because it had already been the subject of a gift in favour of a third party. In support of this contention a deed of gift was produced, and one of the marginal witnesses was called to prove it. He, however, in cross-examination admitted that when he signed his name all the other parties had already signed. It was argued, therefore, that the deed was invalid. For the respondents it was contended that the donor, being a Muhammadan, was not bound by the requirements of the Transfer of Property Act as to the formalities necessary to a valid gift of immovable property, and that, as the transaction was valid according to Muhammadan law, it must stand and the decree of the court below in favour of the plaintiff be maintained.

Mr *C. Dillon*, the Hon'ble Munshi *Gokul Prasad* and Maulvi *Iqbal Ahmad*, for the appellant.

Babu *Benoy Kumar Mukerji*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit brought by the plaintiff for a declaration that certain property was not liable to be sold under a decree. The plaintiff's case was that the property had already been transferred by gift. In support of this contention the plaintiff adduced in evidence a deed of gift. A witness was produced who is a marginal witness. On cross-examination, however, he admitted that when he signed his name all the other parties had already

* Second Appeal No. 1307 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 14th of July, 1914, confirming a decree of Sushil Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th of May, 1913.

1916

KADAM TEARI v. SHARF-UD-DIN.

signed. It is contended on behalf of the defendant appellant that this deed cannot be said to be proved having regard to the provisions of section 123 of Act IV of 1882. We may mention here that the point was not taken in either the first court or in the lower appellate court. Section 123 of the Transfer of Property Act, no doubt, provides that a gift of immovable property must be effected by a registered instrument signed by the donor and *attested* by at least two witnesses. Section 68 of the Evidence Act provides that where a document is required by law to be attested, one at least of the attesting witnesses must be called. The argument is that there was no proof that the deed was attested by two witnesses, and that the witness called by the plaintiff in the court below cannot be regarded as an attesting witness at all inasmuch as he had not seen the donor sign. The respondent relies on the provisions of section 129 of the Transfer of Property Act, which is as follows:—"Nothing in this Chapter relates to gifts of immovable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section 123, any rule of Hindu or Buddhist law." It is admitted that a Muhammadan may make an oral gift provided that possession follows. It seems to us quite clear that the provisions of section 123 are inapplicable to gifts made by Muhammadans and valid according to their law. It is quite clear that the Legislature had in its mind the provisions of section 123 when enacting section 129. Section 123 is specifically referred to in section 129. The deed of gift is admissible to prove that a gift was made. This is the only point which could be or was argued in the present appeal. The appeal fails and is dismissed with costs.

Appeal dismissed.

1916
January, 24.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

MURLIDHAR AND OTHERS (DEFENDANTS) v. DIWAN CHAND AND OTHERS (PLAINTIFFS) *

Will—Construction of document—Dedication of property for worship—Trustee to divide profits after paying expenses—Trust

A testator who owned two houses left one house to one of his two nephews for his own use and as to the other made by his will the following disposition :—

"In the other dwelling house consisting of three sections of Thakurdwara including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchmi*, *Ram Navmi*, *Janam Ashtami*, *Nrasinh*, *Shivratri*, *Dhanwantari* and *Sital Ishtmi* etc., and look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves. . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be entirely null and void."

Held, that the will created a trust and the only beneficial interest given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed.

THIS was a suit for a declaration that a certain house was saleable in execution of a decree passed in favour of the predecessor in title of the plaintiffs.

The only question at issue in the High Court was whether the terms of the will of one Jaypur Krishna Aiyar, the late owner of the house, created an endowment. After stating that he was owner of certain property and during his lifetime wished to remain as owner, he states :—

"After my death Subrat aforesaid shall be the absolute owner of one of my two houses bounded as below and shall be entitled to do with it whatever he likes. In the other dwelling house consisting of three sections of Thakurdwara including the staircase both executors aforesaid should reside, put up pilgrims and attend to them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchmi* etc., etc., and look after its repairs. After this is done, both the executors should make

* First Appeal No. 178 of 1914, from a decree of Banc Gopal, Additional Subordinate Judge of Benares, dated the 20th of March, 1914.

1916

MUHAMMAD
v.
DIWAN
CHAND.

a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves. . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house."

The court below held that no endowment was created by the will and that the property was given to the executors to be enjoyed as their own property. It decreed the suit. The defendants appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellant :—

No express words were necessary to create a valid endowment. It was enough to show that the intention was to make an endowment. The nearest approach to the present case was the case of *Benode Behari Mauliik* v. *Sita Ram Naik Daji Kalia* (1). It was urged in the court below that the house, the subject-matter of this suit, was transferred by one of the two executors. The mere fact of one trustee committing a breach of trust would not change the nature of the property if it is proved that it was *waqf* property; *Debnarain Bose* v. *Sreemutty Comulmonee Dossee*, (2) *Bishen Chand Baniyat* v. *Nadir Hossain*, (3).

Mr. *B. E. O'Conor* (with him Babu *Harendra Krishna Mukerji*), for the respondents :—

The terms of the will only showed that the testator intended to give the property to the two executors and to create a perpetuity in their favour. He nowhere created an endowment. The profits were to go to the two persons in proportion of half and half.

Dr. *Surendra Nath Sen*, was not heard in reply.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which the plaintiffs sought a declaration that a certain house was the property of the defendant No. 3 and was liable to be sold in execution of the decree against him. It appears that at one time the house belonged to a man called Krishna Aiyar, a Madrasee Brahman. He made a will, dated the 7th of September, 1880, in which he dealt with a considerable amount of property. The will recited that he had two nephews

(1) (1900) I. L. R. 27 Calc., 441. (2) (1873) 20 W. R., C. R., 39.
(3) (1887) I. L. R., 15 Calc., 329.

1910.

MUTHUSWAMI v. DEWAN CHAND.

Gauputi and Subrai. His will provided that after his death Subrai should be the absolute owner of one of two houses he mentioned in his will. The will then proceeds :—

"In the other dwelling house consisting of three sections of Thalmadwara including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof daily perform the usual worship of the gods Maha Deva, Raj Rajeshar and Mahadeo and the worship on *Ekam' Panchami, Ram Navami, Janma Ashtami, Nanta'ti, Shivaratri*, Dhavaseras and Sravi festivals and look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be entirely null and void".

"In this connection the members of my community and away lady shall be entitled whenever they come to know that either of those persons or their heirs have in any way sold this said house, to make an application immediately and get the transfer set aside."

The house with which the present suit is concerned is this last mentioned house. The lower court has held that the defendants, or the persons who represent the original devisees, hold the house subject to a charge for the worship of the gods and the observance of the religious festivals, and has so far decreed the claim holding that the house can be sold subject to the charge. The defendants appeal. The case really turns upon the view we should take as to the true construction of the will we have mentioned. It will be seen at once that he draws a sharp contrast between the two houses. One he leaves absolutely to Subrai. He places no restriction on Subrai dealing with the house left to him as he should think fit. Idols of the various deities had been set up in different parts of the second house. It is absolutely clear that if a Muhammadan or Christian or even a Hindu other than a Brahman became the purchaser of this house, such purchaser could not possibly carry out the provisions of the will. The chief profits that would arise to the nephews of the testator and their descendants would be offerings made by the pilgrims. In other words the nephews would profit by the opportunity of getting offerings from the pilgrims. These offerings would, of course, be personal to themselves. In our opinion the will created a trust. The only beneficial interest

given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed. We have no reason for holding under the circumstances of the present case that the bequest was merely colourable and that the intention of the testator was in reality to confer an absolute interest free from any trust upon his nephews. Some point has been made in the court below upon the dealings with the property by the two nephews. In our opinion such dealings can in no way affect the question which we have to decide, namely, as to whether the nephews took the house as a trust or for their own benefit. The facts of the present case closely resemble the facts in the case of *Bepardo Behari Mullick* v. *Sita Ram Naik Daji Kalia* (1) and in the case of *Debendra Bose* v. *Swamatty Comulmonee Dossee* (2). We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

Appeal allowed.

1915

NARENDRAR v. PIYARI CHAND

Before Mr. Justice Piggott and Mr. Justice Sulaiman.

RAM HARAKH (DEFENDANT) v. RAM LAL (PLAINTIFF) AND JAGANNATH AND OTHERS (DEFENDANTS).*

1916

January, 24

Civil Procedure Code (1908), *order II, rule 2—Eviction—Separate suits for property in different districts—Cause of action.*

The plaintiff as a member of a joint Hindu family brought a suit for partition of certain property in the district of Sultanpur. He admitted that he was not in possession of this property, and paid an ad valorem court-fee on his plaint. This suit was settled by a compromise.

Subsequently the plaintiff brought a second suit in Allahabad for partition of some of the joint family property situated in that district, but in this suit he still got that he was in joint and undivided possession and paid a court-fee of Rs. 10 as on an ordinary partition suit.

Held that the compromise of the Allahabad property from the suit in Sultanpur was not a bar to the plaintiff's second suit and that the case did not fall within order II, rule 2, of the Code of Civil Procedure. *Monee Ram Chakravarty* v. *Ganesh Chakravarty* (3), *Uda* v. *Daya* (4) and *Sukha Ram* v. *Lame Ram* (5) referred to.

THE facts of this case were as follows:—

The plaintiff, a member of a joint Hindu family, instituted a suit in Sultanpur, for partition and recovery of possession of his share of the joint family property, situate in the Sultanpur district.

* First Appeal No. 114 of 1913, from an order of S. R. Chaubey, Second Subordinate Judge of Allahabad, dated the 10th of September, 1913.

(1) (1909) 3 A. L. J., 444. (3) (1912) 16 Indian Cases, 88.
(2) (1874) 20 W. R., C. R., 20. (4) (1882) I. L. R., 4 All., 152.
(5) (1887) I. L. R., 9 All., 676.

1916

RAM HARAKH v. RAM LAL.

He alleged that he had been dispossessed by the defendants, and paid an *ad valorem* court fee on his claim. No mention was made in that suit of certain other joint property, consisting of two houses, situate in the Allahabad district. The suit was compromised and a decree for partition was passed. Shortly afterwards, the plaintiff brought a suit in the Allahabad court for partition and separate possession of his share of the houses aforesaid. In this suit the plaintiff alleged that he was in joint possession of the houses, and paid a court fee of Rs. 10. It was stated in the plaint that the first defendant was alleging that the plaintiff's father had made a gift of the houses to him. The plaintiff denied the existence and validity of the alleged gift, but asked for no relief in respect of it. The defence, *inter alia*, was that the present suit was barred by order II, rule 2, of the Code of Civil Procedure, inasmuch as the plaintiff had omitted to include the Allahabad property in his former suit. The court of first instance gave effect to this plea and dismissed the suit. The lower appellate court reversed the decision and remanded the suit for trial on the merits. One of the defendants appealed to the High Court.

Munshi *Nawal Kishore*, for the appellant:—

The present suit is barred by the provisions of order II, rule 2, (2), of the Code of Civil Procedure. In the former suit the plaintiff should have included the whole of his claim in respect of the joint family property, but he omitted to include the property now in suit. The cause of action for both suits was one and the same. When a member of a joint Hindu family seeks to have the joint family property partitioned and his share thereof put in his separate possession, his cause of action is and remains the same whether the whole of the family property is in his joint possession or a part of it is in the exclusive possession of another co-parcener. It is a well-established principle that a suit for partition of joint Hindu family property must embrace all the joint property. There is not a separate cause of action for each item of property, so that a member of a joint Hindu family cannot institute from time to time a hundred different suits in respect of a hundred items of property, *Ukha* v. *Daga* (1), *Sooraj Pershad Tewary* v. *Sukeb Lal Tewary* (2).

(1) (1882) I. L. R., 7 Bom., 183. (2) (1865) 3 W. R., C. R., 25.

1916

RAM HARAKH v. RAM LAL.

The rulings relied on by the lower appellate court are distinguishable. In the case in I. L. R., 28 All., 627, the first suit for partition was dismissed for default; in I. L. R., 31 All., 8, all the co-parceners excepting the plaintiff had agreed, in the first suit, to remain joint, and it was held that there was nothing to prevent them from suing subsequently for partition *inter se*. In the present suit the plaintiff in his deposition says that he is not in possession, so the circumstances of both suits were the same.

Munshi *Kanhaiya Lal*, for the respondents:—

The cause of action was not the same for the two suits. From the allegations in the two plaints it is apparent that there was one important ingredient in the cause of action of the former suit which was not present in the latter. In the former suit the plaintiff alleged that he had been dispossessed by the defendants from the property then in suit; the suit was in substance one for recovery of possession, and the plaint was accordingly stamped with an *ad valorem* court fee. In the present suit there was no complaint of ouster of possession; it was a suit for conversion of joint into separate possession and was therefore filed with a court fee of Rs. 10. Moreover, the present suit sought to set aside a gift set up by the defendants. The cause of action for partition of joint property is a recurrent one and a second suit for partition of joint property which was not partitioned in the first suit will lie; *Bishesher Das* v. *Ram Prasad* (1), *Chandar Shekher* v. *Kundan Lal* (2), *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (3). The property sought to be partitioned in the present suit was not within the jurisdiction of the Sultanpur court; for this reason, also, the suit is maintainable; Mayne's Hindu Law, (eighth Edition), pp. 688, 690, and the cases cited in the foot-notes. The omission penalized in order II, rule 2, is a deliberate, and not an inadvertent omission. There is nothing to show that it was the former in the present case.

Munshi *Nawal Kishore*, in reply:—

If the omission had been inadvertent the plaintiff would have said so in the present plaint. The word "omits" in order II, rule 2, is not qualified by "intentionally." There was nothing to

(1) (1905) I. L. R., 28 All., 627. (2) (1905) I. L. R., 31 All., 8.

(3) (1913) 19 Indian Cases, 883.

1916

RAM HARAKH v. RAM LAL.

prevent the plaintiff from including the Allahabad property in the former suit. The Sultanpur court could have dealt with it and could have been given the relief asked for in the present suit. It was the duty of the plaintiff to have asked for it then. No relief is specifically sought for in the present suit in respect of the deed of gift.

PIGOTT, J.—This is an appeal by one of the defendants in a suit for partition. According to the plaint, the parties owned property in the Sultanpur district and also a house in the city of Allahabad. There was a suit relating to the partition of the Sultanpur property which was settled by a compromise. The present suit was brought after the decree had been passed by the court at Sultanpur. One of the defences taken was that the present suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure, because the plaintiff had neglected to include this house in the property in respect of which he sued in the court at Sultanpur. The court of first instance accepted this plea and dismissed the present suit on this ground alone. The learned District Judge on appeal has held that the provisions of order II, rule 2, do not bar the present suit, and, having reversed the decision of the first court on this point, has remanded the case under order XLI, rule 23, of the Code of Civil Procedure for decision on the merits. The appeal before us is against this order of remand. It is, undoubtedly, the general principle that the plaintiff in a suit for partition must include the whole of the joint family property whether in his possession, or in the possession of the defendant, or in the possession of the parties jointly. At the same time it is clear that the courts have felt considerable difficulties about applying strictly the provisions of order II, rule 2, of the Code of Civil Procedure to different descriptions of suits for partition. I am content to refer to the case of *Mansa Ram Chakravarty v. Ganesh Chakravarty* (1), in which numerous authorities on the subject are discussed. I do not overlook the fact that the suit in that case was as between tenants-in-common, and not as between the members of a joint Hindu family, but the suit was one for partition, and many of the authorities discussed are cases in which the parties were members of a joint Hindu family.

(1) (1912) 16 Indian Cases, 353.

1916

RAM HARAKH v. RAM LAL.

More particularly it is to be noticed that the case of *Uthia* v. *Daga* (1), which is the principal authority in favour of the defendant-appellant, has expressly been dissented from by the learned Judges of the Calcutta High Court. On the facts of the present case I am of opinion that the provisions of order II, rule 2, are not applicable. To begin with, it is open to question whether the Sultanpur court could have entertained the present suit. The plaintiff in the present case alleges that the house in Allahabad is joint family property, still undivided and still in the possession of the parties. He sues strictly for partition, that is to say, in order to have his joint possession of an undivided and unascertained share converted into the separate possession of a specified portion of the house, limited by metes and bounds; he has accordingly stamped the plaint with a court fee of Rs. 10 only, as a suit for partition pure and simple. In the Sultanpur case he alleged his dispossession by the defendants and sued for recovery of possession, stamping his plaint with an *ad valorem* court fee. In the present case, moreover, the defendants have set up against the plaintiff a deed of gift which the plaintiff is seeking to set aside, and that deed of gift was registered in Allahabad. A suit for a mere declaration as to the invalidity of that deed of gift would certainly not have been maintainable before the court at Sultanpur. In Mayne's Hindu Law at page 688, in paragraph 493, of the Eighth Edition, it is laid down in general terms that, if different portions of the property of a joint family lie in different jurisdictions, suits may be brought in the different courts to which the property is subject. Various authorities are quoted for this proposition, the oldest being that of *Subba Rau* v. *Rama Rau* (2). The more recent cases there referred to show that the principle was affirmed in cases where one of the two courts concerned would not have had jurisdiction to entertain the whole claim. It seems to me, however, in the present case, having regard to the form in which the two plaints were drafted, the Sultanpur court would not have jurisdiction to entertain the present suit. Apart from this, I am clearly of opinion that the present suit as brought is not based on the same cause of action as was the suit filed in the Sultanpur

(1) (1882) I. L. R., 7 Bom., 182 (2) (1867) Mad. H. C. Rep., 2, 376

1916

RAM NARAIN v. RAM LAL.

district. The cause of action for a suit is the sum total of the facts and circumstances which the plaintiff has to prove in order to entitle him to the relief claimed. In the present case his cause of action appears to be distinct from that alleged by him at Sultanpur. He says that he has never been dispossessed in respect of the house now in suit, and that may have been his reason for not including it in the specification of the joint family property appended to the plaint filed at Sultanpur. For these reasons I think the learned Judge was right and I would dismiss this appeal with costs.

WALSH, J.—I wish to add a few words. I agree with every thing my learned brother has said, except that I think that the word *must* with regard to what a plaintiff ought to include in a partition suit should, strictly speaking, be *should*, that is to say, the defendant can object if he chooses, but the plaintiff's cause of action is complete in itself if he includes the matter within the jurisdiction of the court. This method, namely, by objection to be raised by the defendant, of getting over the difficulty was recognized by the learned Judges of the Calcutta High Court in their clear judgement in the case of *Manna Ram Chakravarty* v. *Ganesh Chakravarty* (1), to which my learned brother has already referred, and which in my opinion, read with the decision in *Subba Rau* v. *Rama Rau* (2), is decisive of this question. I want to add only one word about order II, rule 2, of the Code of Civil Procedure, which was the really substantial point taken in the first court, accepted by the Munsif, overruled by the District Judge, and argued before us. I agree with the judgement of the District Judge. I do not think that order II, rule 2, applies to a partition case at all. I think that "omits to sue" involves intention. It is *ejusdem generis* with intentional relinquishment. Clause (2) must be read with clause (1). Clause (1) enables a plaintiff to relinquish. Clause (2) points out the two ways in which he may relinquish. He may omit, or he may expressly abandon. It is a pity that the expression "intentionally omits" does not appear in the Rule; but I think that is its meaning. I am fortified in this opinion by two things. I should have hesitated to express it if I had not found confirmation of it in the Bombay case, where they treated the omission as

(1) (1912) 16 Indian Cases, 393. (2) (1867) 3 Mad. H. C. Rep., p. 376.

1916

RAM HARAKH v. RAM LAL.

intentional. Moreover, a decision of the Privy Council has negatived the argument on behalf of the appellant, namely, that the omission to sue may be an accidental omission or in the language used by the learned vakil for the appellant "an after thought." The Privy Council has expressed the opinion that a right which a litigant possesses without knowing it does not come within the Rule cited because it is not "a portion of his claim" and adopting that view it follows that if a plaintiff has accidentally omitted in a partition suit to include undivided property of which he had no knowledge he is not barred. I agree with my learned brother's order dismissing the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1916

January, 31.

GANJA SINGH (DEFENDANT) *v.* RAM SARUP AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 164—Suit against lambardar for profits—Sir and khudkasht land held by co-sharers to be taken into account.

Held that in a suit for profits brought by a co-sharer against a lambardar under section 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have them into account the profits of the *sir* and *khudkasht* land held by the other co-sharers in the village. *Kuhambhar Nath* v. *Bhalo* (1) discussed. *Gulzari Mal* v. *Jai Ram* (2) referred to.

THIS was a suit by certain co-sharers in a village for profits of their shares against the lambardar of the village. The court of first instance decreed the claim in part. The plaintiffs appealed, and the additional District Judge remanded the case for a fresh account to be made up between the parties, including the profits of the *sir* and *khudkasht* lands held by other co-sharers in the village, which had previously not been taken into consideration. In the result the court of first instance (Assistant Collector) passed a decree in favour of the plaintiffs for about half the amount claimed by them. The plaintiffs again appealed and

* Second Appeal No. 1479 of 1914, from a decree of Hafiz Hidayat Ali, Additional Judge of Cawnpore, dated the 31st of July, 1914, modifying a decree of Kunwar Krishna, Assistant Collector, first class, of Cawnpore, dated the 8th of May, 1913.

(1) (1911) I. L. R., 34 All., 98. (2) (1913) I. L. R., 36 All., 441.

1916

GANGA SINGH v. RAM SARUP

this time the lower appellate court increased to some extent the amount formerly awarded to them. The defendant appealed to the High Court, the main question raised in appeal being whether or not the profits of the sir and khudkasht lands ought to be brought into account as between the parties.

Mr. *G. W. Dillon*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit brought by the plaintiffs, who are co-sharers, against the defendant, who is the lambardar, for profits. In the events which have happened the only point which we are called upon to decide is whether the lower appellate court was correct in directing that in estimating what was due to the plaintiffs the *sir* and *khudkasht* held by the other co-sharers should be taken into account. The lower appellate court held that it should. The defendant contends that it should not. If the *sir* and *khudkasht* should be left out of consideration the defendant's appeal should be allowed. If on the other hand it should be taken into consideration the appeal should be dismissed. The appellant's contention is that having regard to the ruling in *Brishambhar Nath* v. *Bhullo* (1) the court below was wrong in directing that the *sir* and *khudkasht* should be taken into account. In that case it was held that a lambardar could not bring a suit to recover profits due to him and other co-sharers from some of the co-sharers who held *sir* and *khudkasht* in excess of their proper shares. The argument is that inasmuch as the lambardar could not sue for the profits of *sir* and *khudkasht* he cannot be made liable, and it is sought to extend this doctrine still further by getting the Court to hold that in a suit under section 161 *sir* and *khudkasht* must be totally disregarded. To illustrate the question under consideration we will suppose a case. If the lambardar has in his hand Rs. 1,000 representing rents which he has collected. He is sued by *B*, who holds a two anna share in the mahal, for Rs. 125, out of the Rs. 1,000. The lambardar admits that he has the Rs. 1,000 and admits that the plaintiffs have a two anna share in the mahals, but says that the plaintiff holds *sir* and *khudkasht* in

(1) (1911) I. L. R., 34 All., 83.

1916

GANGA SINGH v. RAI SAHIB

excess of the other co-sharers and that he objects to pay the plaintiff his proportionate share in the Rs. 1,040, without taking into consideration the *sir* and *khudkasht* which he holds. According to the contention of the appellant on the authority of *Bishambhar Nath* v. *Bhullo* (1) the lambardar would have no answer and would be obliged to pay the plaintiff the whole Rs. 125. It is not quite clear that such an inequitable result really follows from the decision of *Bishambhar Nath* v. *Bhullo* (1). The case was considered in the case of *Gulzari Mal* v. *Jai Ram* (2). The argument in *Bishambhar Nath* v. *Bhullo* (1) and the ground upon which the judgement proceeded was that the lambardar was not the *agent* for the co-sharers so as to enable him without joining the other co-sharers to bring a suit against a co-sharer in respect of the profit of *sir* and *khudkasht*. The court held that he was not the *agent* for the co-sharers. It seems to us that, if the case of *Bishambhar Nath* v. *Bhullo* (1) was rightly decided, it follows that the lambardar could not even sue a tenant for rent without joining all other co-sharers. There is no special section in the Tenancy Act which provides for a suit by a lambardar as such against a tenant and yet we know that it is the regular practice in lambardari villages that the lambardars sue the tenants for rent, and that it is frequently made a ground for making them liable upon the gross rental that they have neglected to bring such suits. If the lambardar is the agent of the co-sharers to bring a suit for rent, he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *khudkasht* in excess and who have refused to allow the *sir* and *khudkasht* which they hold to be taken into account. In the case of *Gulzari Mal* v. *Jai Ram* (2) the learned judges refer to the definition of "lambardar" in the Land Revenue Act. "Lambardar" in the Tenancy Act is declared to have the same meaning as in the Land Revenue Act. In the Land Revenue Act the expression is defined to mean "a co-sharer of a mahal appointed under this Act to represent all or any of the co-sharers in that mahal." In the "lambardari" villages in these Provinces the duties of the lambardar are fairly well understood and recognized. Beyond all doubt he has the power of collecting rents. The

(1) (1911) I. L. R. 34 All., 98 (2) (1914) I. L. R. 36 All., 441.

1916

GANGA SINGH v. RAM SARUP.

following extract from a judgement of the Board of Revenue in our judgement fairly describes the position of the lambardar in a lambardari village:—"Speaking generally the lambardar is the manager of the common funds entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do all necessary acts relating to the management of the estates for the common benefit." It is contended that the only remedy which the plaintiffs had in a suit like the present was a suit under section 185 against all the co-sharers for a settlement of accounts, and it is further contended that *sir* and *khudkasht* rights can never be satisfactorily taken into account except in such a suit where all the co-sharers are parties. It is to be noticed that section 185 does not specifically refer to a suit by the lambardar *as such*. No doubt the lambardar is a co-sharer and would be entitled like any other co-sharer to bring a suit for settlement of accounts. Section 185 does not provide that all the co-sharers must necessarily be parties to the suit, although no doubt in very many cases it would be convenient that they were. The objection that may be made as to want of parties is met by this answer that it is open to any party to a litigation in a proper case to ask the court to add parties. The court also can do this of its own motion. It has a jurisdiction which the court ought not to hesitate to exercise in a fit and proper case. We think that the decision of the court below was correct and should be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1916

February, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

GANPAT RAI AND OTHERS (PLAINTIFFS) *v.* MULTAN AND OTHERS (DEFENDANTS)*.

Act No. I of 1879 (Indian Stamp Act), section 110—Landlord and tenant—Deed of landlord's title—Safeguard.

When once a person is in pursuance of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created. He can no doubt admit that his landlord was the owner at the

---

*Second Appeal No. 1043 of 1914, from a decree of D. Power, District Judge of Saharanpur, dated the 6th June, 1914, confirming a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 28th of June, 1913.

1916

GANPAT RAI v. MUKTAN.

commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end; but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property, and this doctrine is not controlled by the cessation of the tenancy. *Bibi Kunwar* v. *Desraj Ranjit Singh*. (1) followed.

THE facts of this case were as follows:—

The plaintiffs alleged that they were the owners of a house which they had let to the defendants or their predecessors in title on the 27th of March, 1901, for three years; that the latter had executed a *kirayanama* in their favour; that the period for which the property had been leased had expired on the 27th of March, 1904; that the defendants had not paid rent, nor did they vacate the house though several times asked to do so. They accordingly sued for ejectment of the defendants and for arrears of rent.

The defendants denied the execution of the *kirayanama*; denied the landlords' title, and pleaded ownership by adverse possession.

The Subordinate Judge dismissed the suit, holding that the plaintiffs had failed to prove their title and the District Judge in appeal confirmed the decree. The lower appellate court relied on *Lal Mohomed* v. *Kallanus* (2).

The plaintiffs appealed to the High Court.

The Hon'ble Munshi *Gokul Prasad*, (for Mr. *B. E. O'Conor*, Mr. *Agha Haidar* with him), for the appellants:—

The predecessor in title of the defendants having been put into possession of the property and having executed the *kirayanama*, which had been held proved by the lower appellate court, were estopped from denying the plaintiffs' title; *Kein Das* v. *Surendra Nath Sinha* (3). The defendants could not claim by adverse possession till they had actually restored possession to the plaintiffs after the termination of the lease; *Bibi Kunwar* v. *Desraj Ranjit Singh* (1)

Babu *Sital Prasad Ghosh*, for the respondents:—

The moment a person ceases to be a tenant section 116 of the Indian Evidence Act ceases to apply, and a person ceases to be

(1) (1915) L. R. 42 All., 557. (2) (1885) I. L. R., 11 Calc., 513.

(3) (1885) 7 C. W. N., 296.

1916

GANGAY RAI v. MUHAN.

tenant as soon as he has been legally served with a notice to quit. If a tenant continues to hold on after such a notice, he does so as a trespasser and in the present case he has been so treated by the landlord: *Lal Mahomed* v. *Kallanus* (1). The landlord must be presumed to have come into legal possession on the date the tenancy terminated. The determination of the tenancy by efflux of time amounted to a surrender in law.

The Hon'ble Munshi *Gokul Prasad*, was not heard in reply.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for possession of a house. Both the courts below have decided against the plaintiffs. The plaintiffs allege that the relation of landlord and tenant existed between the plaintiffs and their predecessors in title and the defendants and their predecessors in title; that the defendants denied the title of the plaintiffs and that consequently they were entitled to possession. The point we have to decide is a question of law. If we decide it in favour of the appellants it is admitted that the case must go back for trial on the merits. If on the other hand we decide it in favour of the respondents it is admitted that the appeal should be dismissed. The learned District Judge held that the defendants were not estopped from denying the title of the plaintiffs because they or their predecessors in title were not originally put into possession by the plaintiffs or their predecessors in title and that consequently it lay on the plaintiffs to prove their title, which they had failed to do. The learned Judge quotes the Calcutta ruling in the case of *Lal Mahomed* v. *Kallanus* (1). Section 113 of the Evidence Act is as follows:—"No tenant of removable property, or person claiming through such tenant shall, during the continuance of such tenancy be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property." It seems to us quite clear that once a person is the tenant of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created. He can, no doubt, admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's

(1) (1885) I. L. R., 11 Calc., 519.

1916

GANPAT RAI v. MULTAN.

estate has subsequently come to an end, but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property. The words "at the beginning of the tenancy" are expressly inserted in the section to show that the tenant is not prevented from showing that after the tenancy commenced the estate of the landlord devolved on some other person. It is urged that the moment a person ceases to be a tenant the section no longer applies. This is not the view of the law taken by their Lordships of the Privy Council in the recent case of *Bilas Kunwar v. Desraj Ranjit Singh* (1). In that case the defendant was put into possession by the plaintiff as tenant. He never gave up possession, but was served with a notice to quit. He subsequently sought to show that the plaintiff had no title to the property. He claimed that although he could not deny the plaintiff's title so long as the relation of landlord and tenant subsisted, the bar was removed when the tenancy came to an end on the expiration of the notice to quit. Their Lordships of the Privy Council say:—"Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord."

In our opinion the view taken by the learned District Judge was not correct. If the plaintiffs can prove that the relation of landlord and tenant existed between them, or the persons through whom they claim, and the defendant, or persons through whom the defendants claim, then the defendants are not entitled to deny that the plaintiffs or the persons through whom they claim were the owners of the property during all the time the relation of landlord and tenant subsisted and right up to the time that that relationship ceased to exist.

We allow the appeal, set aside the decree of the learned District Judge, and remand the case to him under order XLI, rule 23, with directions to re admit the appeal under its original number on the file and proceed to hear and determine the same on the merits.

Appeal decreed and cause remanded.

(1) (1915) L. R., 37 All., 557.

1916

February 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

ALI HUSAIN AND OTHERS (DEFENDANTS) v. HAKIM-UL-LAH (PLAINTIFF) AND MUHAMMAD SIDDIQ AND OTHERS (DEFENDANTS).*

Construction of document—Covenant in sale-deed that vendee would pay revenue due on other land of the vendor—Land subsequently sold-revised—Regulation No. XXXI of 1803, section 6.

In 1884 one Altaf Husain sold certain land to the predecessor of the defendants and reserved some land for himself. The sale-deed contained a covenant to the effect that the vendee would pay the Government revenue not only for the land purchased by him but also for the land reserved by the vendor for himself. The vendee subsequently sold the reserved land to the plaintiff, who, when the representatives of the original vendee refused to pay the Government revenue, paid it himself and sued to recover from them the amount so paid which the plaintiff had to pay owing to the defendants' refusal to pay.

Held (1) that the agreement was void under Regulation XXXI of 1803 which was in force in 1884 and (2) that in any case the covenant was a personal one and the plaintiff had no right to sue in respect of its breach. *Saleb Ali* v. *Subhan Ali* (1), *Sri Thakurji Maharaj* v. *Lachmi Narain* (2) and *Ram Govind* v. *Sri Thakurji Maharaj* (3) referred to.

THIS was a suit to recover a sum of money paid as Government revenue under the following circumstances. According to the plaintiff one Altaf Husain, in the year 1884, sold certain land to the predecessor in title of the defendants, who covenanted that he would pay the Government revenue which might from time to time be due upon certain other land of the vendor which he did not sell. Subsequently the plaintiff purchased the land in respect of which the said covenant was made. He asked the defendants, according to their covenant, to pay the revenue due in respect of the said land, but they refused to do so. The plaintiff then paid it himself and brought the present suit. The courts below decreed the claim. The defendants appealed to the High Court.

The Hon'ble Mr. *Abdul Raoof*, for the appellants.

Mr. *S. A. Husain*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which the plaintiff alleges that one Altaf Husain had sold certain property to the predecessor of the

* Second Appeal No. 1947 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 4th of September, 1914, confirming a decree of Sushil Chandra Banerji, Additional Subordinate Judge of Aligarh, dated the 2nd of September, 1913.

(1) [1893] I. L. R., 21 All., 12. (2) (1913) 11 A. L. J., 212.
(3) (1913) 11 A. L. J., 331.

defendants, reserving to himself 10 bighas, that in the sale-deed Inayat Husain, the vendee, covenanted that he would pay the Government revenue not only of the land he purchased but also of the ten bighas which the vendor reserved. The plaintiff says that Altaf Husain subsequently sold to him the ten bighas reserved, that the defendants recently refused to pay the Government revenue on the ten bighas; that he had to pay it himself under protest, and that he now brings the suit to recover the amount which he has paid to Government. The courts below have decreed the plaintiff's claim. Two objections are taken on appeal. First, that on the authority of *Sahib Ali* v. *Subhan Ali* (1), which was followed by another Bench of this Court in Second Appeal No. 275 of 1910, decided on the 8th of December, 1910, the agreement was void under Regulation XXXI of 1803, and, secondly, that the agreement does not give any right to the plaintiff to enforce it against the defendants. We find it impossible to distinguish the circumstances of the present case in principle from those in the authorities cited. It is true that the regulation has been repealed, but it was in force in 1884, when the sale to Inayat Husain was made. With regard to the agreement, we may mention that the covenant was a covenant that the ten bighas reserved should always remain free of revenue with the vendor. No mention is made in the sale-deed of the transferees or even of the heirs of Altaf Husain, the vendor. The covenant was a personal covenant, and it is difficult to see how the present plaintiff has any right to sue for a breach of a personal covenant which was entered into between his vendor and the predecessor in title of the defendants. On this part of the case the appellants rely on the case of *Sri Thakurji Maharaj* v. *Lachmi Narain* (2), and also on the case of *Ram Gobind* v. *Sri Thakurji Maharaj* (3). In both these cases the circumstances were very similar. We think that the appeal has force, but under the circumstances we think the parties should pay their own costs in all courts. We accordingly allow the appeal, set aside the decrees of both the courts below, and dismiss the plaintiff's suit, and direct that the parties pay their own costs in all courts.

Appeal allowed.

(1) (1885) I. L. R., 21 All., 12 (2) (1913) 11 A. L. J., 212.
(3) (1913) 11 A. L. J., 231.

1916
February, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

BAJRANGI LAL (DEFENDANT) v. GHURA RAI (PLAINTIFF).*

Suit for cancellation of document—Sale-deed—Alleged illegality of transaction—Sale by one deed of fixed-rate and occupancy holdings.

The plaintiff by one and the same sale-deed purported to transfer (1) a fixed rate holding and (2) part of an occupancy holding. *Held* that he was not entitled to a decree setting aside the sale-deed merely because part of the property covered by it was by law not transferable.

THE facts of this case, so far as the purposes of this report are concerned, were as follows:—

The plaintiff purported to transfer to the defendant Bajrangi Lal by one and the same sale-deed, first, a certain fixed-rate holding and, secondly, part of an occupancy holding. He subsequently sued to have this sale-deed cancelled upon the ground that it had been obtained from him by fraud and misrepresentation on the part of the vendee, and also that it was void because it included a transfer of part of an occupancy holding.

The court of first instance found that the sale-deed had been executed for good consideration and that there was no fraud. It, however, declared the sale-deed void because it included a transfer of a portion of an occupancy holding, and this decision was upheld on appeal by the District Judge. The defendant vendee appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal is connected with Second Appeals Nos. 1354 of 1914 and 1511 of 1914. The suit out of which the appeals arise was brought by Ghura Rai against Lala Bajrangi Lal and Chaturpati Ojha. The plaintiff alleged that defendant No. 1 had fraudulently obtained from him a sale-deed on misrepresentation. He also alleged that the sale-deed was void because it included a transfer of part of an occupancy holding. As against defendant No. 2 he claimed to have a mortgage-deed set aside on the ground that it was a

*Second Appeal No. 1352 of 1914, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 23rd of July, 1914, confirming a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 20th of April, 1914.

1916

BAIRANGI LAL v. GAUGA RAI

mortgage of an occupancy holding which was void by law. He claimed accordingly that the sale-deed and the mortgage deed might be declared void. Alternative relief was claimed that if for any reason the two documents should be held to be genuine, then he should get Rs. 1,600, part of the consideration which was not paid. The present appeal is the appeal of the defendant No. 1. Second Appeal No. 1354 of 1914 is an appeal by the same defendant on the question of costs. The third appeal is that of defendant No. 2 who complains that the court below has not decided whether or not he should get back the Rs. 400, which he alleges he paid as consideration for the mortgage.

The court of first instance has found many of the issues in favour of defendant No. 1. In his case that court found that the sale-deed was duly executed for good consideration and that there was no fraud. It, however, declared the sale-deed void because it included a transfer of a portion of an occupancy holding. As against defendant No. 2 it held that the mortgage of an occupancy holding was bad in law, and (apparently) that the Rs. 400 was not paid.

The lower appellate court held that the mortgage in favour of defendant No. 2 was void. It also decided a question of costs the correctness of which decision depends on the ultimate result of the case. It also held that defendant No. 2 was not entitled to get back the Rs. 400, he alleged he paid. All other questions were left undecided.

The court of first instance decreed that the sale-deed, dated the 20th of January, 1914, executed in favour of Bajrangi Lal was void, and the learned Judge upheld this part of decree of the first court on the ground that the plaintiff had in the same deed purported to sell part of his occupancy holding. The decision is based on the provisions of sections 23 and 24 of the Indian Contract Act. Section 23 provides that every agreement of which the object or consideration is unlawful is void. Section 24 provides that if any part of a single consideration for one or more objects, or any part of any one of several considerations for a single object is unlawful the agreement is void. The contention is that under the provisions of the Tenancy Act an occupancy tenant is prohibited from transferring his occupancy holding. It is said that because the sale-deed

1910

BAIJANGI LAL v. GHURA RAI.

included the transfer of part of an occupancy holding the contract was void and therefore the plaintiff was entitled to the decree he sought. In considering the force of the contention we must bear in mind that we are not dealing with a case in which the court is asked to decree specific performance or even to enforce a contract. We must deal with the question without any regard to the allegations of fraud or of non-payment of the consideration. We must assume that the plaintiff comes into court admitting that he duly executed the deed of transfer after receiving the consideration and contending that the mere fact that the deed purported to transfer an occupancy holding as well as a fixed rate holding entitles him to the declaration. We think it is clear that the plaintiff is not entitled to a decree declaring the transfer of the fixed rate holding void unless he would have been entitled to a decree for possession of the fixed rate holding if the transferee had obtained possession after the transfer. Let us suppose that after the transfer the transferee had entered into possession by receiving profits, collecting rents from the sub-tenants or any other legal way and the transferor had brought a suit for ejectment. Could such a suit be successful? The plaintiff's case would be:—"I have received the money I bargained for. I executed a deed of transfer sufficient in law to pass my interest in the fixed rate holding, but because I myself purported at the same time to transfer other property which I could not transfer, the transfer of the interest in the fixed rate holding is also invalid and I can get the holding back." It may here not be out of place to refer to certain provisions of the Transfer of Property Act. By section 5 the expression "transfer of property" is defined as "an act by which a living person conveys property in present or in future to one or more living persons or to himself and one or more living persons." The expression "to transfer property" means to perform such an act. Section 8 is as follows:—"Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and the legal incidents thereof." By section 54 "Sale" is defined to be a "transfer of ownership in exchange for a price paid or promised or part paid and part promised." By the same section

it is enacted that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. "It does not of itself create any interest in or charge on such property." It thus appears that a contract for sale is one thing and a deed of transfer another and it does not necessarily follow that because the contract was unenforceable that the transfer is void. In the case we have supposed the transferor would have got all that he bargained for, and every part of the consideration passing from the transferee to the transferor the transfer of the interest in the fixed rate holding was perfectly legal. It may be urged that an occupancy tenant who executes a transfer of his interest can, notwithstanding the transfer, recover the holding. This is so, but the reason is, not because the contract was illegal, but because it was an interest which the transferor, by the express words of the Tenancy Act, was not capable of passing (see section 8 of the Transfer of Property Act and section 21 of the Tenancy Act). In the case of the interest in the fixed rate holding the transferor was capable of passing the interest, and the effect of the deed of transfer was to vest the interest in the transferee. Suppose that in pursuance of a contract for the sale of an interest in a fixed rate holding and of the interest in an occupancy holding for a lump sum of Rs. 1,000 the contract was completed by two separate deeds, one being a transfer of the interest in the fixed rate holding and the other a deed purporting to transfer the other interest. The contract would have been exactly the same, carried out and completed by two deeds instead of one. Could the transferor succeed in a suit in which he asked to have the deed of transfer of the fixed rate interest declared void and delivered up to be cancelled? It seems contrary to justice that the plaintiff should be allowed to set up the illegality of his own contract as a ground for defeating a valid transfer. It seems a violation of the well-known maxim *ex turpi causa non oritur actio*. By section 1 of the Infants' Relief Act, 1874, "all contracts whether by speciality or by simple contract henceforth entered into for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void." In the case of

1916

BANSHI LAL v. GHURA RAI

Valentini v. *Canali* (1) the plaintiff, an infant, agreed with the defendant to become tenant of a house and to pay a certain sum for the furniture. The plaintiff paid part of the sum in cash and gave a promissory note for the balance. The contract was set aside and the promissory note was ordered to be cancelled, but it was held that the plaintiff could not recover back the money he had paid after he had enjoyed the use of the furniture. In *Kearley* v. *Thomson* (2) it was held that where money was paid under an illegal contract which had been partially carried into effect the money could not be recovered. FRY, L. J., quotes the words of the Lord Chief Justice in *Collins* v. *Blantern* (3):—"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back."

There is the maxim *in pari delicto potior est conditio possidentis*. In Broom's Legal Maxims the learned author says:—"Upon the whole, then, it seems that the true test for determining whether or not the objection that the plaintiff and defendant were in *pari delicto* can be sustained is by considering whether the plaintiff can make out his case otherwise than through the medium and by aid of the illegal transaction to which he himself was a party." In the present case, on the assumption that there was no fraud, it is only by proving and relying on the illegality of his own contract that the plaintiff can hope to succeed. In our opinion, in the absence of fraud, the plaintiff was not entitled to set aside the transfer of the fixed rate holding and the view taken by the learned Judge was not correct.

We have mentioned that the court below has held that defendant No. 2 was not entitled to get back the Rs. 400 he alleged he paid. The court has not decided the question whether defendant No. 2 paid this sum. Nor has it decided the question whether defendant No. 2 got possession of the occupancy holding mortgaged to him or whether the mortgage was obtained by fraud. We may mention that, if defendant No. 2 got possession, the plaintiff

(1) (1883) L. R., 24 Q. B. D., 166. (2) (1890) L. R., 24 Q. B. D., 742.

(3) (1767) 2 Wilson, 341 1 Sm. L. C., 12th Ed., 412.

should have sued for possession and not merely for a declaration. In our opinion the case must be remanded.

We allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal upon its original number on the file and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

1916

BAIJNATH LAL v. GHURA RAI.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

1916 *February*, 10.

NIHAL SINGH AND OTHERS (PLAINTIFFS) v. THE COLLECTOR OF BULANDSHAHR AND ANOTHER (DEFENDANTS)*.

Contribution—Compromise—Claim by party to a compromise alleging payment by himself of money for payment of which he and others were jointly liable—Joint tort-feasors.

A Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised, and the compromise was made a decree of court. Amongst the conditions of the compromise was one to the effect that the brothers should pay back a certain sum of money belonging to their sister's estate which had been collected and misappropriated by them.

Held, on suit by one of the brothers who alleged that he had paid the whole sum and asked for contribution, that the rule laid down in *Merryweather v. Nixan* (1) that there was no right of contribution amongst joint tort-feasors did not apply to this case where the claim was based on the terms of a compromise, and *quære* whether the rule should to applied in India at all. *Palmer v. Wick and Pulteneytown Steam Shipping Company, Limited* (2) referred to.

THE facts of this case were as follows:—

Thakur Umrao Singh had four sons and a daughter. The daughter was married into a family possessed of considerable property. On the death of the husband of the daughter the father became the guardian of the property of the daughter. On the death of Umrao Singh one of his sons, Rao Giraj Singh, brought a suit against his sister, alleging that she had adopted

* Second Appeal No. 1019 of 1914 from a decree of C. M. Collett, First Additional Judge of Aligarh, dated the 16th of May, 1914, confirming a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 7th of March, 1914.

(1) (1799) 8 T. R., 186. (2) (1894) A. C., 318.

1915

NIHAL SINGH v. THE COLLECTOR OF BULANDSHAHR.

his son, Indarjit Singh, and that this son was entitled to the estate of the deceased husband of the sister. The sister met this claim with a denial and a counter suit against all the brothers, alleging that her father, and after him her brothers, had been in possession of her estate as managers, and were liable to account to her for the profits. Her claim amounted to several *lakhs*. These two suits ended in a compromise decree. The sister agreed to abandon her large claim for the profits of her estate save to the extent of a sum mentioned hereafter. On the other hand the brothers agreed to drop the allegation of the adoption of Indarjit Singh. They also agreed that a sum of Rs. 8,000 odd, which had been collected in her estate after the death of her father and spent on the estate of Kuchaser (i.e., the estate of Thakur Umrao Singh), should be paid to her. This compromise was incorporated in a decree.

The plaintiffs in the present suit alleged that they had paid the whole of this amount themselves, without Tejpal or his sons contributing anything, and they claimed contribution. Tejpal having died and his sons having been made wards of court, the suit was brought against the Collector representing the Court of Wards. The lower appellate court considered that this money represented damages for the wrong doing of all the four brothers and that, as there was no contribution between tort-feasors, the plaintiffs could not recover. The plaintiffs appealed to the High Court

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

Mr *A. E. Ryves*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for contribution. The suit is against the two sons of Tejpal Singh through the Collector as manager of the Court of Wards. Various pleas were raised, including notice and limitation. These pleas have, however, now been dropped. The facts are shortly as follows:—Thakur Umrao Singh had four sons and a daughter. The daughter was married into family possessed of considerable property. On the death of the husband of the daughter the father became the guardian of the property of the daughter. On the death of Umrao Singh one of his sons, Rao Giraj Singh, brought a suit against his sister,

alleging that she had adopted his son Indarjit Singh and that this son was entitled to the estate of the deceased husband of the sister. The sister met this claim with a denial and a counter suit against all the brothers, alleging that her father, and after him her brothers, had been in possession of her estate as managers, and were liable to account to her for the profits. Her claim amounted to several *lakhs*. These ended in a compromise decree. The sister agreed to abandon her large claim for the profits of her estate save to the extent of a sum which we shall presently mention. On the other hand the brothers agreed to drop the allegation of the adoption of Indarjit Singh. They also agreed that a sum of Rs. 8,000 odd which had been collected in her estate after the death of her father and spent on the estate of Kuchaser (i.e., the estate of Thakur Umrao Singh) should be paid to her. This compromise was incorporated in a decree. The allegation of the plaintiffs in the present suit is that they paid the whole of this sum to the decree-holder without Tej Pal or his sons contributing anything and they claim contribution. The lower appellate court considered that this money represented damages for the wrong doing of all the four brothers and that as there was no contribution between tort-feasors the plaintiff could not recover. There can be no doubt that in England if damages are recovered against joint tort-feasors and one pays the entire amount of the decree there is no contribution. This was established in the case of *Merryweather* v. *Nixan* (1). This was considered in *Palmer* v. *Wick and Pulteneytown Steam Shipping Company Ld.* (2). There a joint decree had been obtained against two persons for negligence. One of the judgement-debtors paid the entire amount of the decree and sued the other for contribution. The case was a Scotch one. Lord HERSCHELL says (at page 324 of the report) :—"Much reliance was placed by the learned counsel for the appellant upon the judgement in the English case of *Merryweather* v. *Nixan* (1). The reasons to be found in Lord KENYON'S judgement, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country, but when I am asked to hold it to be part of the

(1) (1799) 8 T. R., 186. (2) (1894) A. C., 318.

1916

NIHAL SINGH v. THE COLLECTOR OF BULANDSHAHR.

law of Scotland I am bound to say that it does not appear to me to be found on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries." It is somewhat doubtful whether the doctrine of *Merryweather* v. *Nixon* (1) should be applied to India, but it is certain that it will not be extended (see the remarks of the other noble Lords who decided *Palmer's* case). In our opinion, however, the question hardly arises in the present case, because the Rs. 8,000 odd, which according to the compromise decree the defendants had to pay in no way represented a decree for damages against tortfeasors. It was a sum of money which the defendants to the suit agreed (as part of the compromise) to pay, altogether irrespective of any tort they might have committed. There can be no doubt that the decree-holder was entitled to get the decretal amount from all or any of the judgement-debtors. No doubt there might have been some equities between the judgement-debtors *inter se*, but *prima facie* if any one of the judgement-debtors paid the entire amount he was entitled to contribution against the others, unless the latter pleaded and proved special circumstances which would render it inequitable that they should contribute to the satisfaction of the decree. In the present case the defendants neither pleaded or proved any such circumstances, and we think the courts below were bound to apply the general rule as to contribution. We allow the appeal, set aside the decrees of both the courts below and grant the plaintiffs a decree as claimed with interest at one per cent. per mensem. Future interest will be at the rate of six per cent per annum. The appellants will have their costs in all courts.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

PIARI LAL (PETITIONER) *v.* HANIF-UN-NISSA BIBI AND ANOTHER (OPPOSITE PARTIES)*

1916

February, 21.

Civil Procedure Code (1908), *section* 144—*Execution of decree—Decree reversed on appeal—Bona fide auction purchaser under original decree—Restitution.*

Restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bona fide* purchaser for value at an auction sale held by a

* First Appeal No. 372 of 1914, from a decree of Shams-ud-din Khan, Additional Subordinate Judge of Aligarh, dated the 31st of March, 1914.

(1) (1799) 8 T. R., 186.

court which had jurisdiction to hold the same: *Ram Makser v. Ram Kishen Singh* (1), *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (2) and *Ahlas Husain Khan v. Dilsaad Begam* (3) referred to.

1916

PIARI LAL v. FAIZ-UN-NISSA BIBI.

THE facts of this case were as follows :—

Musammat Faiz-un-nissa filed a suit against Musammat Hamid-un-nissa, Bashir-un-nissa and Muhammad Ibrahim Ali Khan and others for a declaration that the sale-deed, dated the 27th of September, 1889, executed by her in favour of the defendants was null and void. She prayed for possession also. On the 5th of November, 1902, the suit was dismissed by the Subordinate Judge of Aligarh, but was decreed by the High Court on the 17th of April, 1905. The decree-holder sold this decree to Bansidhar on the 22nd of November, 1905, for Rs. 40,000. He executed the decree and recovered several items by the sale of different portions of the property and certain sums were paid up by the judgement-debtors themselves. The defendants appealed, and their Lordships of the Privy Council setting aside that decree, remanded the suit, and thereupon, on the 8th of May, 1912, the High Court dismissed the suit, confirming the decree of the Subordinate Judge of the 5th of November, 1902.

The defendants Hamid-un-nissa and Bashir-un-nissa thereupon applied for execution of the decree of the 8th of May, 1912, claiming restoration of the money paid by them and of their property sold away. They made the auction-purchasers and Bansidhar's sureties also parties to the proceeding. Twelve objections were filed by Bansidhar, the sureties and the purchasers.

The court of first instance disallowed the objections.

This was an appeal by the purchaser at auction sale of part of the property the subject of the original sale-deed.

Mr. *B. E. O'Conor*, for the appellant.

Dr. *S. M. Sulaiman* for the respondents.

At the first hearing the following issues were referred by the Court.

(1.) Was Lala Piari Lal the real auction-purchaser or a *benamidar* for Lala Bansidhar ?

(2) Was Girwar Prasad the real auction-purchaser of the property in question or did he purchase nominally for his own

(1) (1889) I. L. R., 14 Calc. 18. (2) (1887) I. L. R., 10 All., 166.
(3) (1913) 16 Oudh Cases, 325.

1916

PIARI LAL v. HANIF-UN-NISSA BIBI.

benefit and in reality with the intention of passing the property on to the decree-holder Bansidhar and was the transfer by Girwar Prasad in favour of Lekhraj in reality a transfer in favour of Bansidhar ?

On receipt of the findings the judgement of the Court was delivered by

PIGGOTT and WALSH, JJ.:—The finding on the issues remitted by us in our order of the 20th of May, 1915, is in favour of the appellant. We must now take the facts to be substantially these :—Certain property was put up for sale in the execution of a decree by one Bansidhar, who was a transferee of that decree. As regards the particular property in question in this appeal, it was purchased at auction by the appellant Lala Piari Lal. On the findings now returned, which have not been seriously assailed in argument before us, and which we must accept upon the evidence, we hold that Lala Piari Lal was a *bond fide* auction-purchaser for value. The decree under execution at the instance of Bansidhar has been reversed on appeal, and the question before us is whether the judgement-debtors can obtain restitution, not merely as against Bansidhar himself (this they have already obtained) but against Lala Piari Lal. We have been referred to a large number of authorities on this point, but it really seems unnecessary to go beyond the two decisions of their Lordships of the Privy Council, in *Rewa Mahton* v. *Ram Kishen Singh* (1) and *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (2). The precise question now in issue was argued out before a Bench of the Judicial Commissioner's Court at Lucknow of which one of us was at the time a member. The case is that of *Mashat ud-daula Abbas Husain Khan* v. *Dilband Begam* (3). Numerous authorities are there referred to, and the conclusion arrived at is that restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bond fide* purchaser for value at an auction sale held by a court which had jurisdiction to hold the same. This appeal must therefore succeed. We set aside the order of the court below and direct that the appellant be restored to possession of the property which has been made over to the

(1) (1888) I. L. R., 14 Calc., 18 (2) (1887) I. L. R., 10 All., 165.

(3) (1913) 16 Oudh Cases, 325.

respondents under the order appealed from. The appellant will get her costs in both courts.

Appeal allowed.

1916

PIARI LAL v. MANIK-UN-NISSA BIBI.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1916 *February*, 17

SHAMBHU SINGH (PLAINTIFF) *v.* DALJIT SINGH AND OTHERS (DEFENDANTS).*

Act (Local) No III of 1901 (United Provinces Land Revenue Act), section 233, clause (k)—Civil and Revenue Courts—Jurisdiction—Partition—Land of a third party alleged to be wrongly included in a patti formed by imperfect partition—Suit for recovery of possession in Civil Court.

Where land belonging to one *patti* was, apparently by mistake and without notice to the person who claimed to be the rightful owner thereof, included in another *patti* and made the subject of an imperfect partition, it was *held* that the person who claimed to be the owner of the land to dealt with was not debarred by section 233 (*k*) of the United Provinces Land Revenue Act, 1901, from suing in the Civil Court to have had right to the land declared and to recover possession thereof. *Muhammad Sadiq v. Lauta Ram* (1) distinguished.

Quære whether section 233 (*k*) of the United Provinces Land Revenue Act, 1901, applies at all to an imperfect partition.

This was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows:—

"The question for determination in this appeal is whether this suit was barred by the provisions of sections 233 (*k*) of the United Provinces Land Revenue Act, Local Act No. III of 1901. According to that section the Civil Court is debarred from taking cognizance of any suit with regard to partition or union of mahals. The section itself is drawn up in broad terms and it has been applied broadly by this Court ever since the Full Bench decision in *Muhammad Sadiq v. Lauta Ram* (1). That decision was under the former Land Revenue Act No. XIX of 1873, the wording of which differed somewhat. The provisions of section 233 (*k*) as they now stand, were considered by two Judges of this Court in *Lachman Das v. Hanuman Prasad* (2). I understand that ruling as laying down the broad principle that where there has been a partition of a certain mahal by a Revenue Court, resulting in a certain distribution of the lands of that mahal being effected, if any error has been

* Appeal No. 94 of 1915, under section 10 of the Letters Patent.

(1) (1903) I. L. R., 26 All., 203. (2) (1910) I. L. R., 33 All., 169.

1910

SHAMBHU SINGH v. DALJIT SINGH.

made in connection with this distribution to the prejudice of a particular co-sharer, the remedy of the latter is by way of application to the Revenue Court itself to correct its own mistake. Any exercise of jurisdiction on the part of a Civil Court which would disturb, or in any way affect, the distribution of land made on a partition, is barred by section 263 (*h*) of Act III of 1901. The facts of the present case are given at length in the very careful judgement of the learned Munsif. It appears that the mahal with which we are concerned had been divided by perfect partition in the year 1875. A number of *pattis* had been formed, one of which, *patti* No. 9, was known as *patti shamilat*, and consisted of those lands which had not been divided amongst the co-sharers, that is to say, the joint lands in which all the co-sharers of the various *pattis* retained their rights according to their proportionate shares. In the year 1904, Daljit Singh, who is the defendant in the present case, presented an application for the separation, by perfect partition, of his share in *patti* Nos. 4 and 5 and also of his share in *shamilat patti* No. 9. Notice of this application was issued to all the co-sharers of all the various *pattis* in the mahal. The Assistant Collector, however, came to the conclusion that there were objections to a perfect partition, and intimated as much to Daljit Singh. The latter thereupon presented a fresh application on the 25th of March, 1905, asking the court to separate his share by imperfect partition only, thus forming it into a new *patti*. The learned District Judge seems to have felt some doubt as to whether on this application any actual partition of the lands appertaining to the *shamilat patti* No. 9 could have followed, or naturally did follow. Obviously, when Daljit Singh's application was limited to one for imperfect partition, no actual partition of the lands appertaining to the *patti shamilat* would follow. A new *patti* would be created by separating Daljit Singh's share in lands appertaining to *pattis* Nos. 4 and 5 from those of the other co-sharers in the same *pattis*. In the course of carrying out this imperfect partition the Assistant Collector laid hold of a plot, ·60 of an acre in area, shown as No. 1956 in the village map. He treated this as appertaining to *patti* No. 4 and divided it amongst the co-sharers of that patti assigning to the defendant appellant, ·19 acre as his share in the same. The plaintiff in this case, Shambhu Singh, has acquired since the partition the proprietary rights which belonged in the years 1904 and 1905, to a co-sharer named Dalip Singh. He contends that plot No. 1956 above referred to never appertained to *patti* No. 4 at all, but formed part of the land appertaining to *patti* No. 2, in which Dalip Singh was a co-sharer. He suggests that the proceedings of the Assistant Collector dealing with this plot in the course of the partition of 1905 were a pure mistake. The courts below have gone into the question of fact. Apparently it was not a question which could be settled off-hand on a mere inspection of the village records. It turned upon a comparison of the existing village records with the older papers and the ascertainment and location of the older numbers which went to make up plot No. 1956 on the present village map. The courts below have, however, found that plot No. 1956 did appertain to *patti* No. 2 and was wrongly included by the Assistant Collector in *patti* No. 4 and partitioned amongst the co-sharers of that *patti*. Assuming that this finding is correct, the plaintiff has suffered an injury, but

1916

SHAMBHU SINGH v. DALIP SINGH.

the question remains whether his remedy is by way of suit in a Civil Court, or, as was said in the ruling to which I have already referred, by way of application to the Revenue Court to correct its own mistake. Both the Learned Munsif and the learned District Judge have taken the view that the case stood on an entirely different footing from the moment that Dalip Singh applied to the Revenue Court to separate his share from the rest of the mahal by imperfect instead of by perfect partition. It certainly cannot be denied that if the proceedings had continued on the application for perfect partition as originally brought, and the Assistant Collector had, however erroneously, taken this plot of land and divided it amongst the co-sharers in *patti* No 4, a suit would not have been maintainable in the Civil Court to disturb that apportionment. I understand the District Judge to mean that the sharers in the remaining *patti* other than *patti* Nos 4 and 5, ceased to have any interest in the partition, or to be under any obligation to watch the proceedings in the Assistant Collector's Court, from the moment that Dalip Singh's application was limited to an application for imperfect partition. The only reported case I can find which lends some support to the decision of the courts below is that of *Kishen Prasad* v. *Kedhar Mal* (1), which was a single Judge case. So far as I can discover from the reported cases of this Court, it has only once been considered by a Bench of this Court, and that was in *Jagan Nath* v. *Vikrmi Sahai* (2). It was there distinguished, though not expressly dissented from. It seems to me that the plaintiff is not entitled in the present case, to ask the Court, to treat the Assistant Collector's proceedings as nullity. On Dalip Singh's application for partition the Assistant Collector had to ascertain what lands belonged to *patti* Nos 4 and 5 and to apportion them between the record-ed co-sharers of the said *patti*. He would have to do this equally on an application for imperfect partition as on an application for perfect partition. It may be that the Assistant Collector came to an erroneous decision when he included this plot No 1093 in the area which he proceeded to apportion amongst the co-sharers of *patti* No 4. Nevertheless he did so, and it seems to be impossible to say that he had no jurisdiction to do so. This case is really distinguishable from that of *Kishen Prasad* v. *Kedhar Mal* (1), because in the present case all the co-sharers in the *shamilat patti*, including the proprietors of *patti* No 2, had notice of the partition proceedings. I am not sure that I should myself have been disposed to regard this as a result desirable, but it seems to me that I am bound to follow the general principle laid down in *Lachmon Das* v. *Hanuman Prasad* (3), unless something can be shown to take the case before me outside the operation of that principle. Nothing opinion this appeal must succeed. The suit was not cognizable by reason of the provisions of section 233 (3) of the Land Revenue Act and should have been dismissed accordingly. I accept this appeal and setting aside the decrees of both the courts below dismiss the plaintiff's suit with costs throughout."

The plaintiff appealed.

(1) Weekly Notes, 1900, p. 11 (2) (1905) I. L. R., 27 All., 42.
(3) (1906) I. L. R., 33 All., 109.

1916

SHAMBHU SINGH v. DALJIT SINGH.

Pandit *Kailas Nath Katju* (with The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The present suit is a suit against a person who is in possession of the plaintiff's land. He is only a trespasser. Section 233 (*k*) of the Land Revenue Act does not bar a suit by a rightful owner against a trespasser, although the effect of it may be to upset a partition. The learned Judge of this Court relies upon the case *Muhammad Sadiq* v. *Lavle Ram* (1) but the underlying principle of that case is that persons who were no parties to partition proceedings are not bound by them. The present plaintiff was not interested in *patti's* 4 and 5 and could not have been and was not made a party to the partition proceedings of 1905. That partition cannot therefore bind him; *Dharam Singh* v. *Ram Dayal Singh* (2) *Bhagwati Prasad* v. *Bhagwati Prasad* (3). The case on all fours with the present case is *Kishen Prasad* v. *Kadher Mal* (4), which was followed in 1914 by Mr. Justice SUNDAR LAL in *Dharam Singh* v. *Ram Dayal* (2).

Munshi *Gulzari Lal*, for respondent:—

The bar created by section 233 (*k*) of the Land Revenue Act is an absolute bar for any relief which may have the effect of undoing a partition. No doubt it is unjust to bind a person by a decree or order to which he was not a party. But the law lays down that whenever a person has an opportunity of filing objections and does not file them he will be deemed to be a party to the proceedings. The procedure is laid down by sections 106, 107, 111, 112 of the Land Revenue Act. All we have to see is whether the plaintiff had an opportunity of filing objections. When an application is made notice is issued to all the co-sharers in the mahal whether the application is for perfect or imperfect partition. This must have been done in the present case. The plaintiff must be deemed to be a party to the partition proceedings. The old Act (XIX of 1873) section 241 laid down that a partition could not be disturbed at the instance of a person who was a party to the proceedings but the new Act section 233 (*k*) does not lay down any such limitation. When the effect of a suit is to disturb a partition the courts, under the new

(1) (1901) I. L. R., 23 All., 291.
(2) (1914) 12 A. L. J., 1126.
(3) (1912) I. L. R., 35 All., 126.
(4) Weekly Notes, 1900, p. 11.

1916

SHAMBHU SINGH v. DALIP SINGH.

Act, cannot entertain it. The learned Judge of this Court has rightly dismissed the suit which is governed by the case of *Lachman Das* v. *Hanuman Prasad* (1).

The appellant was not called upon to reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claims a declaration of his title to and possession of a certain plot of land. The case will be found reported in 13 A. L. J., 770. It is only necessary to shortly sum up the facts which have been found by both the courts below. In a particular mahal there were nine *pattis* formed in the year 1875. *Patti* No. 9 was a *shamilat patti* common to all the cosharers. In course of time *patti* No. 3 became the property of plaintiff. The defendant was a cosharer in *pattis* Nos. 4 and 5 and also in the *shamilat patti* No. 9. The plaintiff, or his predecessor in title, had no share in *pattis* Nos. 4 and 5. In 1904, the defendant made an application for perfect partition in the Revenue Court. He asked that a separate mahal might be made of his share in *pattis* Nos. 4 and 5 and also in No. 9. For some reason or another this application was dropped and a fresh application was made for imperfect partition in the year 1905. There is nothing to show whether or not the predecessor in title of the plaintiff, Dular Singh, ever got notice of this second application. It resulted in a separate *patti* being formed of the defendant's share in *pattis* Nos. 4 and 5, the *shamilat patti* remaining unpartitioned. The plaintiff instituted the present suit, alleging that in the partition made on the second application of the defendant, a portion of his *patti* No. 3 was erroneously brought into the defendant's new *patti*. He accordingly claimed a declaration of his title to the plot and possession if he should be found out of possession. Both the courts agreed that there was a mistake and that portion of the plaintiff's land was by mistake given to the defendant. The first two courts decided in his favour. A learned Judge of this Court held that the suit was barred by the provisions of section 233, clause (*k*), of the Land Revenue Act of 1901. That section provides that no person shall institute any suit or other proceeding in the Civil Court *with respect to partition or union of mahals except as provided in sections* 111 *and* 112. Sections

(1) (1910) I. L. R., 33 All., 150.

1916

SHAMBHU SINGH v. DALIP SINGH.

111 and 112 provide that if in partition proceedings in the Revenue Court questions of title arise, the Collector may, if he thinks fit, try the question himself in which case he is to adopt the procedure therein mentioned and his decree is deemed the decree of the Civil Court. It seems to me extremely difficult to hold that the present suit is a suit "with respect to partition or union of mahals." It is admitted that, if the very same suit was brought by a person who had not received notice or by reason of his not being a recorded co-sharer was not a party to the partition proceedings, his suit would not have been barred by section 283 (*h*). But it is said that the section is a bar to the suit if the plaintiff was a party to the partition proceedings in the Revenue Court. I have great difficulty in seeing how a suit is a suit "in respect of partition" if brought by one person while it is not a suit "in respect of partition" if brought by another. The suit, if brought by a person who was not a party to the Revenue Court proceedings, affects the partition neither more nor less than it would if he was a person who was a party to the Revenue Court proceedings. It would disturb or upset the recent partition as much and as little in the one case as in the other. The section deals with suits of a particular nature, not with the parties to it. One has to carefully bear in mind the distinction between holding that the suit is a suit which the plaintiff cannot institute in the Civil Court and holding that the proceedings in the Revenue Court are a defence to the suit. If the suit is one which cannot be instituted, it is at once thrown out on the ground that the Civil Court has no jurisdiction to hear it. It is quite a different matter if, after the case had been heard, the court finds that the proceedings in the Revenue Court disclose a defence to the suit, for example, on the ground of *res judicata*. The facts of the present case seem to me to illustrate how dangerous it would be to hold that a suit like the present could not be instituted in the Civil Court, and in this connection I may remark that a party has a right to institute in the Civil Court any suit which he is not by the Legislature in clear terms prevented from instituting. In my opinion, under the circumstances of the present case, we are entitled and bound to treat the second application which was made by the defendant in the year

1916

SHAMBHU SINGH v. DALIP SINGH.

1905, as an application for the partition of *pattis* 4 and 5 alone. These were the only two *pattis* which were, as a matter of fact, dealt with in the partition. This being so, the present plaintiff or his predecessor in title was in no way interested in the manner in which *pattis* 4 and 5 were partitioned. The plaintiff's predecessor in title had no share in *pattis* 4 and 5 and the applicant for partition had no share in *patti* No. 2, which belonged to the plaintiff's predecessor in title. It seems to me that the plaintiff was not even a necessary party to this second application in so far as it was for the partition of *pattis* 4 and 5. He would only be a necessary party to a partition which was for the division of the property in which he was concerned. In my opinion the present suit was not barred by the provisions of section 233, clause (*k*), of the Land Revenue Act, and, as the findings are in favour of the plaintiff, I think the decree of the lower appellate court ought to be restored. I would allow the appeal.

I may add one word about the case of *Muhammad Sadiq* v. *Laute Ram* (1). It seems to me that the plaintiff was there asking the Civil Court to partition what was part and parcel of the property which could only be partitioned by the Revenue Court.

TUDBALL, J.—I fully agree. Partition means, as pointed out in section 106 of the Revenue Act, division not only of a mahal but also a part of a mahal. In the present case what was actually partitioned on the basis of the application of the 25th of March, 1905, was a part of the mahal in which the present plaintiff, or his predecessor in title, had no concern. It was immaterial to him how the land of those two *pattis* was divided amongst the co-sharers therein. What seems to have happened is that in dividing the land of those two *pattis* the partition court erroneously thought that a certain plot was within the boundaries of those two *pattis* and took it into consideration in the partition. Of that fact the plaintiff, or his predecessor in title probably had not the slightest information at all. It was only when the plaintiff's possession began to be disturbed that he had any knowledge of what had occurred. He has

(1) (1904) I. L. R., 26 All., 201.

1916

SHAMBHU SINGH v. DALJIT SINGH.

come into court with the present suit, which in substance and in form is a simple suit for possession of land on the basis of title on the allegation that certain persons who had no title thereto had trespassed on it and some had taken it into their possession. I believe that, as a matter of fact, he made no objection to the partition proceedings nor was it necessary for him to do so. In my opinion in the circumstances of this case it is utterly impossible to say that the suit is a suit in respect of the partition of *pattis* Nos. 4 and 5. It is really a suit in respect of the trespass committed by certain persons on property to which they had no title whatsoever. In the course of the arguments attention has been called to the decision of this Court in *Muhammad Sadiq* v. *Lauta Ram* (1) and great stress has been laid upon certain remarks to be found in the judgement therein. The facts of that case were simple. There was a partition. All the co-sharers were parties to that partition. The lands constituting the mahal were actually divided among the co-sharers. On some of the lands stood some trees. The plaintiff in that case came forward with a civil suit for the partition of the trees on the allegation that the Revenue Court had not, as a matter of fact, partitioned the trees and moreover had no jurisdiction whatsoever to partition the trees. Therefore he asked for division of the trees among the persons concerned. This Court held and I think rightly that the Revenue Court had jurisdiction to divide up not only the land but also the trees upon it, and that it had actually divided both the land and the trees. The suit was one which was barred by section 241 (*f*) of the old Land Revenue Act, which deprived the Civil Court of any jurisdiction in a matter relating to the distribution of the land among the co-sharers. In my opinion the case was rightly decided on the facts thereof, and any remarks which are to be found are to be read in conjunction with the facts and circumstances of that case and they are not to be taken out of their setting and placed apart as being general principles which will govern the facts and circumstances of every other case.

In my opinion the decision of the courts below was correct and I would allow the appeal.

(1) (1901) I. L. R., 23 All., 291.

1916

SHAMBHU SINGH v. DALJIT SINGH.

MUHAMMAD RAFIQ, J.—I am also of opinion that this appeal should prevail. The appeal is on behalf of the plaintiff and the question for decision is whether his claim is barred by the provisions of section 233, clause (*b*), of the United Provinces Land Revenue Act (Local Act No. III of 1901). In order to determine the question it is necessary to recite some of the facts which are either admitted or proved. It appears that as long ago as 1875, a partition took place through the Revenue Court between the co-sharers of the mahal under which it was divided into several *pattis*, one of which, *patti* No. 9, was known as *patti shamilat*. *Patti* No. 2 was awarded to one Dular Singh, the predecessor in title of the plaintiff, and *pattis* Nos. 4 and 5 were allotted to Daljit Singh defendant and some others. In 1905, Daljit Singh applied for separation of his share out of *pattis* Nos. 4 and 5 as also out of the *shamilat patti* No. 9 by perfect partition. On the application of Daljit Singh notices were issued to all the co-sharers of the *pattis* in the mahal. The Assistant Collector, however, declined to make a perfect partition, expressing an opinion that he would, if so desired, allow an imperfect partition. Thereupon Daljit Singh presented a fresh application asking for the separation of his share by an imperfect partition. The Assistant Collector, in the course of separation of the share of Daljit Singh out of *pattis* Nos. 4 and 5, somehow included a portion of the land belonging to *patti* No. 2, that is, of Dular Singh. The plaintiff, who is the purchaser of Dular Singh's rights in *patti* No. 2, instituted the suit out of which this appeal has arisen for a declaration that the said portion of land, taken out of *patti* No. 2 and included in the *patti* of Daljit Singh by mistake during the proceedings of imperfect partition in 1905, belonged to him and that, in case he was found out of possession, a decree for possession should be granted to him.

The first two courts found that the land in suit formed part of *patti* No. 2 and decreed the claim. On appeal a learned Judge of this Court held that, though the land in suit was a part of *patti* No. 2, the plaintiff could not maintain the present suit in view of the provisions of section 233, clause (*b*), of the United Provinces Land Revenue Act, and accordingly reversed the decree of the lower courts. The plaintiff has preferred this Letters Patent

1916

SHAMBHU SINGH v. DALJIT SINGH

appeal and contends that section 233, clause (*k*), does not govern his case. On the other hand, the respondents rely on the said section and the Full Bench case of *Muhammad Sadiq v. Laute Ram* (1). They contend that under the Revenue Act "no person shall institute any suit or other proceeding in the Civil Court with respect to partition or union of mahals except as provided in sections 111 and 112" of the Act. Dalar Singh, the predecessor in title of the plaintiff, should have raised the question now raised during the proceedings of imperfect partition in 1905, or in any case he could have done so. He having failed to do so, no civil suit lies. I do not think that the contention for the respondents is correct. The partition or union of mahals referred to in clause (*k*) of section 233 means the partition or union of those mahals in respect of which partition or union is sought and not any other. The prohibition therefore governs the case of those mahals only in respect of which partition or union is asked for and made. It could not apply to other mahals which were not the subject of partition or union. If the construction of the section in question contended for on behalf of the respondents were correct, the proprietors of a village some portion of whose land had been included by mistake or error during the partition of an adjacent mahal, would have no remedy at all. It may be said for the respondents that the proprietors of the village could bring a civil suit on the ground that they had no notice of the partition of the adjacent mahal. But the obvious reply would be that under the law no notice was required to be given to them, and partition once made and no objection taken during the partition proceedings, no civil suit could be entertained. However, in the present case it has been found by the lower courts that no notice was given to Dalar Singh of the second application of Daljit Singh asking for imperfect partition. In my opinion, even if a notice had been issued to Dalar Singh he might very well have kept away thinking that he was not concerned with the partition of *pattis* Nos. 4 and 5, in which he had no share. Besides it is doubtful whether the provisions of section 233, clause (*k*), of Act III of 1901, would apply to proceedings in an imperfect partition. In the case of

(1) (1901) I. L. R., 23 All., 201.

1916

SHAMBHU SINGH v. DALJIT SINGH.

Aisha Begam v. *Abdulla Khan* (1) it was held that the omission to raise the question of title by a party to an imperfect partition did not preclude him from suing afterwards in the Civil Court to establish his title. In another case, namely, that of *Kishen Prasad* v. *Kadher Mal* (2), it was held that if at a perfect partition of a mahal the land of another mahal was taken by mistake and divided and no objection was taken by the co-sharers of the latter mahal they were not debarred from suing in the Civil Court to establish their title.

It is true that both these cases were decided under the former Act (Act XIX of 1873) but the provisions of that Act as to the exclusion of the jurisdiction of the Civil Court were similar to those in the present Act (III of 1900). It may, however, be argued that the said cases were decided before the Full Bench case of *Muhammad Sadiq* v. *Lalta Ram* (3) and hence may be taken to have been overruled. The reply is that the points raised in the former cases were not raised and decided in the Full Bench case. Besides the facts of the latter case were quite different from those reported in the Weekly Notes for 1899 and 1900, and from the present case. The facts of the Full Bench case were that Muhammad Sadiq, Dewan Mal and some others were co-sharers in a certain village. An application was made by some of the co-sharers, in which Dewan Mal did not join, for perfect partition, and notices were issued to all the co-sharers, including Dewan Mal. He made no objection in time. The Assistant Collector made the partition, in the course of which he divided the groves also. The share of Dewan Mal was sold in execution of a decree and purchased by Lalta Ram. The latter brought a suit in the Civil Court for a declaration of his title to the groves on the allegation that they belonged exclusively to Dewan Mal and that the Revenue Court could partition the land but not the trees. It was held that the suit of *Lalta Ram* could not be entertained by a Civil Court in view of the provisions of section 241, clause (*f*), Act XIX of 1873. The case of *Lalta Ram* is clearly distinguishable from the present case on three grounds, namely, first, there was in that case a perfect partition, secondly, property included in the village sought to be partitioned

(1) Weekly Notes, 1899, p. 180. (2) Weekly Notes, 1900, p. 22.

(3) (1901) I. L. R., 23 All., 207.

1916

SHAMBHU SINGH v. DALJIT SINGH

was divided and no property outside the village was taken and divided, and, thirdly, the Revenue Court could divide also the groves situate in the village. *Lakhe Ram's* case is therefore not in point and does not help the respondents. The case of *Dharam Singh* v. *Ram Dial Singh* (1) is in point and supports the view of the law I have taken. In my judgement the provisions of section 233, clause (*b*), of Act No. III of 1901 do not govern the present case.

BY THE COURT:—The order of the Court is that the decree of the learned Judge of this Court is set aside and the decree of the lower appellate court is restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

1916

February, 10

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

GUR DAYAL SINGH AND OTHERS (DEFENDANTS) v. KARAM SINGH AND ANOTHER (PLAINTIFFS)*

Act No. IV of 1882 (Transfer of Property Act), section 55 (4) (b)—Sale—Vendor's lien—Lien not enforceable against subsequent purchaser without notice.

The vendor's lien for unpaid purchase money provided for by section 55 (4) (*b*) of the Transfer of Property Act, 1882, cannot be enforced against the property in the hands of subsequent transferees for value without notice of the lien. *Webb* v. *Macpherson* (2) distinguished.

THE facts of this case were, shortly, as follows:—

On the 28th of August, 1903, the plaintiffs sold certain property to one Gur Dayal, who is the first appellant in this suit for Rs. 250. The vendors received Rs. 90 in cash and left Rs. 160 with the vendee for payment to their creditors. Gur Dayal did not pay any of the creditors, but sold the property to one Kundan, who in turn transferred it to the defendants Nos. 4 and 5. The creditors of the plaintiffs recovered their money from the plaintiffs, who thereupon brought the present suit against Gur Dayal and his transferees for recovery of the money. The

*Second Appeal No. 594 of 1914, from a decree of Abdul Hasan, Subordinate Judge of Saharanpur, dated the 27th of January, 1914, modifying a decree of Priya Charan Agarwal, Munsif of Saharanpur, dated the 30th of January, 1912.

(1) (1914) 12 A. L. J., 1126. (2) (1903) I. L. R., 31 Calc., 67.

court below decreed the suit, holding the money to be a charge on the property. The defendants appealed to the High Court.

Mr. *Nihal Chand*, for the appellants:—

There is no charge on the property, which is in the hands of a purchaser for value and in good faith. The charge referred to in section 55 (4) *(b)* is only a lien which exists only between the vendor and the first vendee, but as soon as the first vendee sells the property to purchasers in good faith and for valuable consideration the charge is gone. In this case the subsequent transferees cannot be said to have notice of the charge. It was about six years after the first sale that Kundan purchased the property, and he was not bound to make inquiry, after such a long time, as to the existence of the charge about non-payment of the balance of the price. The suit ought therefore to have been dismissed.

The Hon'ble Mr. *Abdul Raoof*, for the respondent:—

The purchasers had notice from Gur Dayal's sale-deed of the existence of the seller's charge, and it lay on them to ascertain whether or not it had been satisfied. If the charge once existed, it continued to exist so long as it was not satisfied. If it existed in the hands of the first purchaser, it existed when the property was in the hands of subsequent transferees. Notice is defined in section 3 of the Transfer of Property Act. In the present case the purchaser was bound to make inquiry. The charge here is created by section 55 (4) *(b)* and the property remains burdened as under a charge created by act of parties. There is no difference between the two. *Maina* v. *Buchahi* (1), *Meghraj Vaish* v. *Abdullah Khan* (2), *Webb* v. *Macpherson* (3).

Mr. *Nihal Chand*, was not heard in reply.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which the plaintiffs seek to recover a sum of Rs. 476 principal and Rs. 83 interest, in all Rs. 559, against all the defendants, and in default, that certain property should be sold. The facts of the case were somewhat complicated, but for the purpose of the questions of law which we have to decide it is

(1) (1905) 3 A. L. J., 552. (2) (1914) 12 A. L. J., 1034

(3) (1903) I. L. R., 31 Calc., 57.

1916

GUR DAYAL SINGH v. KARAM SINGH.

not necessary to go with great detail into them. On the 28th of August, 1903, the plaintiffs sold certain property to Gur Dayal. This property was sold in consideration of Rs. 250. In the detail of consideration is is stated that the vendor has received Rs. 90 in cash and that he has left Rs. 160 for payment to certain creditors of the vendor. We may mention that the nature of the debt which was to be paid was a simple contract debt and not a mortgage debt. As a matter of fact the purchaser did not pay the creditors of the vendor. His alleged reason for not doing so was that he did not get possession of part of the property sold, and there certainly was a dispute about the matter. The vendor's title was by no means perfect. On the 1st of April, 1909, Gur Dayal sold the property (together with other property) to one Kundan. Kundan on the 27th of April, of 1909, resold the property to Jiwan Singh and Kapur Singh, the defendants 5 and 6. It will thus appear that neither Gur Dayal nor Kundan have any longer any interest in the property. The plaintiffs allege, that in consequence of the failure of Gur Dayal to pay Rs. 160 left in his hand, a suit was brought against them by the creditors and a decree was obtained against them and the appellants had to pay Rs. 380. Their present claim is made up of this sum together with interest and costs. The contention in favour of the plaintiffs is that under section 55, clause (4), of the Transfer of Property Act they have a charge against the property and that the property in the hands of defendants 5 and 6 is liable to be sold. The court of first instance gave the plaintiffs a decree, but only for Rs. 160 together with interest at 6 per cent. The lower appellate court thought that the plaintiffs were entitled to the full amount which they had to pay to satisfy the decree and made its decree accordingly. It seems difficult to understand how, under any circumstances, the property in the hands of defendants 5 and 6 could have been made liable for anything more than the amount of the Rs. 160 together with interest thereon. Section 55, clause (4), of the Transfer of Property Act provides that the seller is entitled where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money to a charge upon the property *in the hands of the buyer* for the amount of the purchase-money or any part thereof remaining unpaid and

for interest on such amount or part. Apart from authority, it seems difficult to treat the words "in the hands of the buyer" as mere surplusage. A vendor's charge for unpaid purchase-money is obviously one which in all cases ought to (and in most cases would) be promptly enforced. The broad contention of the plaintiffs is that the charge can be enforced against all subsequent transferees quite irrespective of notice. If this contention be correct every purchaser of immovable property buys with the possibility of there being a charge on the property in respect of every previous transfer; which would mean that no purchaser is safe and the door would be opened to any amount of fraudulent claims. The respondents rely on the case of *Webb* v. *Macpherson* (1). The facts in that case were very peculiar and very different from the facts in the present case. By an indenture, dated July 17th, 1892, one Lloyd conveyed certain property to one Tucker. The consideration was Rs. 81,210, of which Rs 30,000 was paid in cash and the balance of Rs. 51,210 was to be *secured* by the formal undertaking of the purchaser. The indenture recited that this "formal undertaking" had been executed by the purchaser. The money was not paid, and Lloyd was allowed to retake possession. Macpherson subsequently purchased three-fourths of the property and it was from Lloyd that Macpherson got possession. Macpherson thus purchased the property with express notice that Lloyd had not been paid. Their Lordships no doubt held that Lloyd's executors had a charge on the whole property including the portion sold to Macpherson. In this connection it must be borne in mind that the meaning of the words "in the hands of the buyer" in section 55, sub-section 4, of the Transfer of Property Act were not considered. The case may fairly be said to be an authority for the proposition that, notwithstanding the words "in the hands of the buyer," the seller can enforce the charge mentioned in section 55, sub-section 4, against the property in the hands of a subsequent purchaser who has notice of the fact that the purchase-money in the first transfer, or some part of it, has not been paid. This would be in accordance with the general principles of equity, though it is going outside the provisions of section 55, clause 4, where their Lordships say we are to look to see the nature of the

(1) (1903) I. L. R., 31 Calc., 87

1916

GUR DAYAL SINGH v. KARAM SINGH.

right. To hold, however, that the charge can be enforced against subsequent purchasers without notice would mean that the court should treat the words "in the hands of the buyer" as superfluous and meaningless and would in our opinion be extending the decision in *Webb* v. *Macpherson* (1) in a manner never intended by their Lordships. In our opinion the charge mentioned in section 55 (4) cannot be enforced against subsequent transferees for value without notice.

It is next contended that the subsequent purchasers in the present case had "notice". This contention is based on the following line of argument: In the sale-deed of 1903, it is mentioned that Rs. 160 had been left in the hands of the purchaser for payment to the creditor of the vendor, therefore it was the duty of Kundan who made the purchase on the 1st of April, 1909, to enquire if his vendor had fulfilled his contract and paid the creditor. Again it was equally the duty of defendants 5 and 6, when the third transfer was made, to examine the transfer to his vendor and having done so to ascertain if the Rs 160 had been paid. It is said that not having made these inquiries the defendants had *constructive* notice (see section 3, clause *(e)*, Transfer of Property Act). In our opinion it cannot be said, in the circumstances of the present case, that the transferees in 1909 "wilfully abstained from an inquiry or search which they ought to have made." In our opinion defendants 5 and 6 did not have notice of the alleged charge. We have already mentioned that in the present case the plaintiffs' contention is based on the fact that it appears from the deed of transfer that Rs. 160 was left with the buyer for payment to a creditor of the seller. In *Webb* v *Macpherson*, at page 73 of the report, their Lordships say:—"There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one which, it made out, might have had the effect which the High Court have given to it." Their Lordships then go to deal with the particular terms of the conveyance in the case before them. There is a marked distinction between the terms of that conveyance and the present. It

(1) (1903) I. L. R., 31 Calc., 57.

would appear in this case that the agreement was to pay, not the vendor, but the creditor of the vendor. In *Webb* v. *Macpherson* the agreement was to pay Lloyd (the vendor) himself. In this case it was only when the buyer neglected to pay the creditor and the creditor got a decree against the seller that the latter brought or was entitled to bring the present suit. In *Abdulla Beary* v. *Mammali Beary* (1), which was a case very like the present, and in which *Webb* v. *Macpherson* was cited, the Madras High Court held that the vendor had no charge on the ground that the consideration undischarged by the buyer was an agreement to pay the creditor and not unpaid purchase-money.

In the case of *Maghraj Vaish* v. *Abdullah Khan* (2), Mr. Justice SUNDAR LAL considered that the case of *Webb* v. *Macpherson* applied and he further considered that there had been a finding of fact by the lower courts (binding on him in second appeal) that the subsequent transferee had notice.

In the case of *Tribhuvan Girdhardas* v. *Kashibai* 3), the sale-deed recited that the consideration had been paid, and the court held that the vendor could not enforce a charge against a subsequent mortgagee without notice. It is true the court held the vendor estopped and decided the case on that ground. At page 61, JENKINS, C. J., says:—"I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb* v. *Macpherson* did not turn on the special circumstances of that case." BATCHELOR, J., says, at page 67—"The section gives the charge over the property 'in the hands of the buyer,' but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb* v. *Macpherson*, it was intended to decide that the charge was extended to persons claiming through the buyer." These remarks by the learned Judges seem to indicate that they thought it doubtful whether their Lordships of the Privy Council intended to decide in *Webb* v. *Macpherson* any principle outside the facts and circumstances of that particular case.

(1) (1910) I. L. R. 33 Mad., 349. (2) (1914) 12 A. L. J., 1034.
(3) (1908) I. L. R., 33 Bom., 53

1916

GUR DAYAL SINGH v. KAMAN SINGH

In our opinion the Rs. 160 was not "unpaid purchase-money." The consideration was Rs. 90 in cash and the agreement of the vendee to pay the creditor.

We allow the appeal, set aside the decrees of both the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed

1916
January, 28.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MAHADEO PRASAD AND OTHERS (DEFENDANTS) v. JAGAR DEO GIR (PLAINTIFF) AND SUNDAR CHAUDHARI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ularz—Owners of resumed muafi land—Co-sharers.

Held that the owners of a plot of resumed *muafi* land assessed to revenue separately from the rest of the village, which constituted one 16 anna mahal, was not a co-sharer with the owners of the mahal so as to give him a right of pre-emption on sale of the mahal, under the terms of the wajib-ul-arz which declared a right of pre-emption to exist, on a sale by a *co-sharer*, in favour of other co-sharers in the village.

Kalian Mal v. *Madan Mohan* (1), *Narain Das* v. *Ram Saran Das* (2), *Rajkumari Prasad* v. *Kanhaya Lal* (3), *Ahmad Ali* v. *Najamun Nisa* (4) and *Babu Lal* v. *Bisla Nath* (5) referred to. *Narain Prasad* v. *Munna Lal* (6) not followed.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Dr. *Sundar Lal*, Munshi *Gulzari Lal* and Munshi *Lakshmi Narain*, for the appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, Dr. *Surendra Nath Sen*, Munshi *Harnandan Prasad* and Maulvi *Iqbal Ahmad*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.:—This is defendant vendee's appeal arising out of a pre-emption suit based on village custom, which has been decreed by the court below. The last four pleas in the memorandum of appeal have not been pressed. The first three grounds of appeal raise only one question, viz. whether under the custom of pre-emption prevailing in the village of Amwa Singh, the plaintiff has any right at all to pre-empt the property in suit.

* First Appeal No. 275 of 1914, from a decree of Muhammad Hasan, Subordinate Judge of Ghazipur, dated the 14th of June 1913.

(1) (1895) I. L. R., 17 All., 447.
(2) (1893) I. L. R., 20 All., 419.
(3) Weekly Notes, 1902, p. 68.
(4) (1905) 2 A. L. J., 145.
(5) (1913) 19 Indian Cases, 119.
(6) (1908) I. L. R., 30 All., 32.

1916

MAHADEO PRASAD v. JAGAR DEO GIR.

The custom on the point of pre-emption was not stated in the plaint. The plaintiff in paragraph 1 thereof alleged that he and the defendants second party were co-sharers in the village, that a custom prevailed in the village that the vendees were strangers and that as against them the plaintiff had a right of pre-emption under the wajib-ul-arz.

The plea taken before us by the vendees is that in the circumstances of this village the plaintiff is not a co-sharer with the vendors and is not entitled under the custom to pre-empt. Admittedly in the village of Amra Singh there is only one sixteen anna mahal in which the plaintiff has *no* share whatsoever. The vendors are the owners of the whole mahal and have by their sale-deed transferred to the vendees the *whole* of it. In short the vendors had no co-sharer with them, a fact of very great importance as we shall shortly show.

There is, however, in the village a certain area of land which up to 1840 was held by the predecessors in title of the plaintiff, free of revenue.

In 1840, or shortly before, Government resumed *the muafi* or revenue free grant, assessed it to revenue, and the holder thereof paid that revenue and still pays it direct to Government.

This area measures 30 bighas 11 biswas 9 dhurs, and its revenue is Rs. 87-2 + 0-14-0 cesses.

The area of the 16 anna mahal is 842 bighas, 10 biswas and one dhur and its total revenue Rs. 613-9-9. The plaintiff is a Goshain. The vendors who owned the 16 anna mahal are mallahs by caste. The village is in the Ghazipur district where the permanent settlement is in force. It is an admitted fact that the plaintiff has no share in the lands which constitutes the 16 anna mahal nor does he enjoy any part of the income derived therefrom. In the same way the vendors had no right, title or interest in the land of the resumed *muafi*.

Prima facie, therefore, the plaintiff was not a sharer, much less a co-sharer with the vendors in anything; but on his behalf it is urged that he and the vendors were all jointly liable for the revenue of the whole village (i. e., both the mahal and the resumed *muafi*) and that he is in this way a co-sharer in the village and therefore under the custom entitled to pre-empt. It is therefore

1913

MAHADEO PRASAD v. JAGAR DEO GIR.

necessary to examine the history of the village and also the evidence put forward to prove the custom. The village is situated in the Ghazipur district and is permanently settled. A reference to the wajib-ul-arz of 1840 will show (in the preamble) that the revenue of the mahal was permanently fixed at Rs. 630-9-9 in the year 1197 Fasli (1789-1790 A.D.)

That same preamble and clause 7 show that Khardaigir, the plaintiffs' predecessor in title, had, until 1840 A.D., held a certain area, revenue free, but that it had just before 1840 been resumed by Government and a revenue of Rs. 88 fixed upon it, (the correct figures as per Khewat are Rs. 87-2 plus 14 annas for road cess). The same document shows that in 1840 certain lands *within the mahal* were held as *jagirs* by certain persons, and the Khewat of 1290 Fasli (1882-1883), shows that an additional sum of Rs. 13 had been added to the revenue of the mahal in respect to those *jagirs* so that the revenue of the mahal in 1882-1883 was recorded as Rs. 630-9-9 plus Rs. 13 for the *jagirs*. Total Rs. 643-9-9.

It will also be seen that in 1882-1883 a separate khewat called a supplementary khewat was drawn up for the resumed Mhal land, i.e., the resumed *muafi*.

Furthermore, in 1248 Fasli (1841) a separate (vide 9 A) *pattidari* statement (or khewat) was drawn up for this land showing Kandhaigir as the lambardar thereof and the Government demands as Rs. 88 (Revenue Rs. 21-3-plus road cess Rs. 6-14-0.)

In 1840 also, the owners of the 16 anna mahal were not of the same caste as the owner of the resumed *muafi*. It is thus clear that when the permanent settlement was made, there was one mahal assessed to revenue and a certain area outside that mahal not assessed to revenue, though liable to assessment.

The mahal and this area are owned by separate bodies of persons. There was but one engagement for the payment of revenue and that by the owners of the mahal only. In the year 1840 there was no new settlement. It could only have been a revision of records as the settlement was permanent.

But a wajib-ul-arz was drawn up. The preamble begins "we (here follow the names of the co-sharers)- zamindars and shareholders of mauza Anwa Singh do declare as follows." It will be noted that this list of share-holders does *not* include "Kandhaigir"

1916

MAHADEO PRASAD v. JAGAN DEO GIR.

the owner of the resumed *muafi*. He is not to be confounded with Kandhaiya Rai. The declarants then state that the jama of this mahal was permanently fixed at Rs. 630-9-9 in the settlement of 1197 Fasli and the jama of the land of Kandhaigir has "*now*" been fixed as Rs. 88 and that they voluntarily execute the wajib-ul-arz agreement and that they will be bound by the conditions entered therein.

In clause 1 they say:—"We pay the Government revenue and are in possession."

In clause 7 they stated:—"*Kandhaigir* has *muafi* land which has been resumed and has recently been settled at a jama of Rs. 88. We shall take that jama also and shall pay it *along with our jama*."

In clause 10, they say:—"Should any of *us* wish to transfer his share in whole or in part by sale or mortgage, he should inform his *co-sharers* of the village and sell the share to them for a price. If they refuse to take it or pay the proper price he is at liberty to make a sale or mortgage to any person he likes. Should he transfer his share to a stranger without informing the co-sharers of the village the sale shall not be held to be valid."

In paragraph 11 they say:—"We shall always remain in possession according to the details of shares given at the foot."

In paragraph 12 they say, in respect of the appointment of a new lambardar:—"Another person shall be appointed as lambardar according to the opinion of the majority of *us*."

In paragraph 13 they say:—"We make collections from every tenant in respect of our respective shares according to the patwari's rent roll."

After paragraph 16 follow the "details of the shares" mentioned in para 11. These details include *only* the shares which go to make up the 16 anna mahal and do not include the *muafi* land of Kandhaigir.

The wajib-ul-arz is signed by or on behalf of the co-sharers of the mahal and not by Kandhaigir. Clause 10 is the clause which sets out the custom of pre-emption and it distinctly confines the custom to the co-parcenary body of the 16 anna mahal and does not extend it so as to include the owner of the resumed *muafi*.

1916

MAHADEO PRASAD v. JAGAN DEO GIR

It will also be seen that Kandhaigir had a separate Khewat or pattidari statement allotted to him at this revision of records, which he alone signed, vide Exhibit N at page 9 of the appellant's book. It is clear that his liability for the revenue of his land was entirely separate under agreement with Government made some 51 years after the agreement of the permanent settlement. All that the co-sharers of the 16 anna mahal agreed with Government to do in respect thereto was to collect it from him and pay it into the treasury "*along with our jama.*"

A mahal means one of four things as laid down in the definition in section 4, clause (4), of the Land Revenue Act. We need not consider sub-clauses *(b)*, *(c)* and *(d)* as we are not now concerned with them in this case. Sub-clause *(a)* gives the general definition and we see that a mahal means any local area held under a separate engagement for the payment of land revenue provided that (1) if such area consists of a single village, or portion of a village a separate record of rights has been framed for such village or portion. In the case now before us the village consisted of one mahal *plus* a bit of resumed *muafi* land held under a separate agreement for the payment of its revenue. The mahal had a separate record of rights and the co-sharers did not take upon themselves any responsibility for the revenue of the resumed *muafi*. They agreed to collect it on behalf of Government and to pay it into the treasury when they paid their own. Section 141 of the Revenue Act says: In the case of every mahal the revenue assessed *thereon* shall be the first charge on the entire mahal and on the rents, profits or produce thereof, and section 142 says.—"All the proprietors of a mahal are jointly and severally responsible to Government for the revenue for the time being assessed thereon."

It is therefore clear that in this village of Anwa Singh, the co-sharers of the 16 anna mahal (and that mahal itself) were responsible for the revenue assessed *thereon* and were in no way responsible for the revenue of the resumed *muafi*, in which they had no right, title or interest, which was held by Kandhaigir under a separate engagement and which was not liable in any way for the revenue of the 16 anna mahal.

1916

MAHADEO PRASAD v. JAGAR DEO OJH

It is of no avail to say that the resumed *muafi* did not constitute a mahal in itself. We are not so sure that it did not do so, but even if it did not, that fact did not render the 16 anna mahal and its proprietors responsible for its revenue. There are many such plots in these provinces. Such was the state of affairs at the time when this *muafi* was resumed by Government.

We next come to the wajib-ul-arz drawn up at the next revision of records in 1290 F (1882-1883 A.D.)

The first thing to be noticed is that by that time both the 16 anna mahal and the resumed *muafi* had changed hands.

The *zaïs* who held the former had been replaced by two Mallahs, Baijnath, son of Karwaru, and Mahadeo, son of Bachchu Lal, both of Ghazipur town. They each owned a half of the mahal (vide Khewat at page 11 of the appellant's book). The revenue of the mahal was Rs. 643-9-9 being the original sum of Rs 630-9-9 plus Rs. 13, assessed on the old *jagir* lands of the mahal.

The resumed *muafi* had gone to one Alam, a Rankt by seat and a Musalman. Moreover he had mortgaged it to other Musalmans who were in actual possession. Strangers had thus come in and replaced the old owners. We see that at the present moment the resumed *muafi* has gone back to a Goshain, the plaintiff, and the Mallahs have now sold their 16 anna mahal to some Mahajans, the present appellants.

At this revision of records two separate khewats were drawn up, (1) one which is headed the khewat of mauza Anwa Singh for 1290 F. (vide IIA) and which relates only to the 16 anna mahal, and (2) one which is headed "Supplement to the khewat in respect to the resumed *milak* lands in mauza Anwa Singh." The former is signed by Baijnath, one of the two co-sharers, and there is appended to it a note, signed by the Deputy Collector and other officials which ran as follows :—"Baijnath zamindar verified this khewat to day for himself and for the *other co-sharers* as mukhtar."

The latter (supplementary khewat) was not signed, but bears a note signed by the Deputy Collector:—"To-day Bahadur having appeared as a Mukhtar on behalf of Alam, *holder of the resumed land* and of Abdus Samad, admitted this khewat to be correct." There were no fresh engagements taken for the payment of the

1915

MAHADEO PRASAD v. JAGAN DEO GIR

revenue; the permanent settlement prevented that; but a new wajib-ul-arz was drawn up. It was divided into chapters.

Chapter I, is headed "Customs of the *mahal* and the nature of the property."

Paragraph 1 sets forth that the village is in the form of zamindari tenure and all the proprietors are in *proprietary possession* and *occupation of their respective shares*. This clearly did not relate to the resumed *muafi*, which did not constitute a share and moreover was in the occupation and possession of a mortgagee.

Paragraph 2 runs thus—"The lambardar deposits the Government dues (*jama*) in the Government Treasury from the *income of the mahal* in the following instalments; and the *jama of the resumed muafi land is deposited by the muafidar himself*, who obtains the revenue receipt in the name of the lambardar, inasmuch as the lambardar is under all circumstances liable for payment of the *jama* and is held liable in case the revenue falls into arrears." It will be noticed that the *jama* of the mahal is to be paid out of the income of the mahal and that it is clearly distinguished from the *jama* of the resumed *muafi* which has to be paid by the *muafidar* himself, though he takes a receipt, in the name of the lambardar. It will be remembered that in the former wajib-ul-arz the zamindars co-sharers agreed with Government to recover the revenue of the resumed *muafi* from the holder thereof and to pay it into the treasury with their own revenue. The only change introduced in this year was that in future the *muafidar* was to pay his own revenue direct to Government.

Chapter II is headed—"The rights of the *co-sharers inter se* based on custom or agreement."

An examination of the whole of this chapter will show that its contents relate *in toto* to the rights of the owners of the 16 anna mahal and *in no way* refer to the rights of either inferior proprietors or the owner of the resumed *muafi*. For these latter persons, a separate chapter No 3 was reserved headed "Rights of persons in possession" i.e., *Huhuk-i-Kabizan*. The reason of this separation is obvious when we examine section 32 of the Act XIX of 1873, the Revenue Act which was then in force in these

provinces. It directed the Settlement Officer to frame for each mahal a record containing a list of—

(*a*) All the co-sharers.

(*b*) All other persons occupying any portion of the land therein or who are in possession of any heritable and transferable interest in such land or receiving rent in respect thereof.

(*c*) The nature and extent of the interest held therein by each of such *co-sharers* and *other persons*.

(*d*) All persons holding land free of rent or revenue free.

It will be noticed that the body of co-sharers is a distinct and separate body from that of those persons who hold land *revenue free*, etc. The latter are not co-sharers in the mahal.

Throughout chapter II it is stated that the *proprietors* of the mahal are joint in food and that their income is jointly enjoyed by them (vide paragraphs 1 and 7). The owners of the 16 anna mahal were Hindus and joint. The owner of the resumed *muafi* was a Musalman and therefore clearly does not come within the term proprietor used in this chapter.

In paragraph 2 it is stated that the post of lambardar if it falls vacant is filled by a nominee of the sharers of the mahal. In paragraph 11 it is stated that *muafi* grants are made and resumed by the proprietors of the mahal, and then in paragraph 13 it is laid down as follows :—" The custom as to the right of pre-emption is this :—When a co-sharer wants to transfer his property he at first transfers it to his near relation and afterwards to his distant relatives from among the *co-sharers of the village*. If these persons refuse to take it, then other sharers in the village who are not relatives are entitled to take the property." The custom sets forth a right of the *co-sharers inter se*, as the heading of the chapter shows and it does not state it as a right also of the owner of the *muafi*. His rights are stated in Chapter III, paragraph 2. Chapter IV relating to the rights of tenants concludes the wajib-ul-arz.

To sum up briefly, the custom according to the entry in both wajib-ul-arzes was clearly a custom existing among the co-sharers in the 16 anna mahal, with which the owner of the resumed *muafi* had no concern. In the document of 1840 the custom was clearly

1916

MAHABIR PRASAD v. JAGAN DEO GIR.

thus stated, the resumed *muafi*-holder not even dictating or signing the document.

In that of 1852, his signature appears but his rights are separately treated from those of the owners of the 16 anna mahal and not in the chapter in which the custom of pre-emption is mentioned.

In both these years there was a separate khewat for each of these two sets of proprietors. The 16 anna mahal was held under one engagement for the payment of revenue made at the time of the permanent settlement.

The resumed *muafi* was held under an entirely separate engagement made at the time of resumption in 1840 or shortly before. It is therefore clear that the owners of the mahal and the mahal itself with its rents, profits and produce are in no way responsible to Government under sections 141 and 142 of the Revenue Act (III of 1901), for the revenue of the resumed *muafi*, even though the lambardar of the mahal may have agreed with Government in 1840, to collect the revenue of the latter from the owner thereof and pay it into the treasury with his own. That agreement came to an end in 1852, when it was agreed that the resumed *muafi* holder was to pay it himself direct to Government.

There is therefore no right common to the owners of the mahal and the resumed *muafi*. The owners of the one have no right or interest in the other or its rents, profits or produce, nor do they share in the responsibility for the revenue of the other. They are not co-sharers in any sense of the word. The object of the custom of pre-emption in village has frequently been stated to be the prevention of the entry into the co-parcenary body of an outsider. If we leave out of consideration some rare and unusual customs (which at times give the right to certain persons, by reason of blood relationship or otherwise, who have no share), it is clear that he who seeks to prevent this must himself be a member of that co-parcenary body. In this class of cases this Court has repeatedly laid emphasis on the necessity for the pre-emptor proving that he is a co-sharer, in either the profits or the liability for revenue, with the vendor, vide *Dalganjan Singh* v. *Kalka Singh* (1)

(1) (1892) I. L. R., 22 All., 1.

1916

MAHADEO PRASAD v. JAGAN DEO GIR.

and *Ganga Singh v. Chedi Lal* (1), in the latter of which the former is quoted, discussed and approved.

In the present case the plaintiff pre-emptor is clearly not a co-sharer with the vendors at all there being no right or liability common to both.

The position of the owner of a resumed *muafi* in regard to pre-emption has frequently been the subject of decision in this Court and these decisions have been practically uniform. In *Kallian Mal v. Madan Mohan* (2), it was held that the owner of a resumed *muafi* was not a co-sharer in the village within the meaning of the wajib-ularz. This was quoted and followed with approval in *Narain Das v. Ram Saran Das* (3). The same view was taken in *Raghunath Prasad v. Kanhaiya Lal* (4) and *Ahmad Ali v. Najim-un-nissa* (5), and in *Bansi Lal v. Bhola Nath* (6).

On behalf of the respondent our attention has been called to four reported decisions reported in 8 A. W. N., 182 (1888) I. L. R., 7 All., 526, I. L. R., 12 All., 426 and I. L. R., 30 All., 329.

In the first three of these cases there was no question whatever of the position of the owner of resumed *muafi*.

In the first of these cases the pre-emptor Tara Chand was the owner of certain plots, which were *part and parcel of the actual patti*, the revenue of which had been reduced because these plots had been planted as groves, but they being part of the mahal were responsible to Government for the revenue of the mahal.

In the second of these cases the plot exchanged was similarly an integral part of the mahal.

In the third the defendant vendee was held to be a co-sharer because he was the actual owner of certain plots all duly assessed to revenue and actually part of the mahal for the whole revenue of which they stood charged. These cases are therefore not in point. In the case reported in 30 All., 329, the property sold was part of a resumed *muafi* and the plaintiff pre-emptor was a

(1) (1891) I. L. R., 13 All., 501.
(2) (1895) I. L. R., 17 All., 447.
(3) (1898) I. L. R., 20 All., 4.0.
(4) Weekly Notes, 1899, p. 98
(5) (1905) 2 A. L. J., 145
(6) (1913) 19 Indian Cases, 140.

1916

MAHADEO PRASAD v. JAGAT DEO CHR.

co-sharer in that resumed *muafi* while the vendee was a co-sharer in another one.

The custom as laid down in the wajib-ul-arz in that case was :—

"If from among the *Malikan deh*, any co-sharer wishes to sell his property (*Hakiyat*), he will first sell the same to a co-sharer in the property (*Sharik Hakiyat*) and in case the latter refuse to purchase, then to any one he likes."

It was held that resumed *muafi* was '*hakiyat*' and that the owner of resumed *muafi* was a *malik* or owner. In the circumstances of that village and custom the decision may have been perfectly correct. The plaintiff was actually a co-sharer in the property part of which had been sold. The judgment does not set forth the constitution of the village. It quotes with approval the decision in *Lalta Prasad* v. *Lalta Prasad* (1). In this latter case it was held that the words "in the zamindari" occurring in the wajib-ul-arz were used only to limit the qualification of a brother by blood and not to circumscribe the area in the mauza to be governed by the clause in the wajib-ul-arz relating to the right of pre-emption. The report does not give the whole judgement, but the case appears somewhat in favour of the respondents' contention. It is, however, not in accordance with the long line of decisions all the other way from 1895 up to the present time and the question of co-ownership was not considered. In our opinion, the plaintiff pre-emptor in the present case had no community of interest; was not a co-sharer with the vendors, and was not one of those to whom the custom as proved gave a right of pre-emption. The decision of the court below on this point was wrong.

It was necessary for the plaintiff to prove not only that some custom prevailed. He had to prove a custom which gave him a right to pre-empt the property in suit. Any evidence given in the case was as to a custom between *co-sharers*. The plaintiff, as we have shown, was not a co-sharer with the vendor. He has failed to prove the existence of a custom which gives him a right of pre-emption as against the vendees.

We, therefore, allow this appeal, set aside the decree of the court below and dismiss the suit with costs in both courts.

Appeal allowed.

(1) Weekly Notes, 1881, p. 165.

PRIVY COUNCIL.

* P.C.
1916
March, 14.

DEBI BAKHSH SINGH (JUDGMENT-DEBTOR) v. SHADI LAL (DECREE-HOLDER).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Oudh Land Revenue Act (XVII of 1876), sections 173, 174—Contract entered into by disqualified proprietor creating charge on his property whilst under superintendence of Court of Wards—Liability of property in execution of decree obtained in respect of such contract after property has been released—N-W. P. Land Revenue Act (XIX of 1873), section 208B, as amended by United Provinces Court of Wards Act (III of 1899).

Section 174 of the Oudh Land Revenue Act (XVII of 1876) enacts with respect of persons whose property is under the superintendence of the Court of Wards, that, "no such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence."

Held that the phrase, "while his property is under such superintendence" was directed to and declares of the lawful exposition of whatever shall be done by such person." Where the phrase is construed has been made it does not such period of time, the effect of the section is to protect the property and attachment in execution of the decree, even after the property has been released from superintendence of the Court of Wards.

The dictum to the contrary in *Ramchar Bakhsh Singh* v. *Dhanpat Das* (1) overruled.

APPEAL No. 80 of 1914, from a judgement and decree (12th of November, 1913) of the Judicial Commissioner of Oudh which affirmed a finding and order (4th of June, 1913) of the Court of the Subordinate Judge, Bahraich.

The appellant was the Talukdar of Mahmudpur, the successor to one Raja Muneshwar Bakhsh Singh, whose estate was under the management of the Court of Wards up to July, 1899, when it was released. Whilst the estate was in charge of the Court of Wards Raja Muneshwar Bakhsh Singh borrowed certain sums of money from the respondents; and in the course of litigation which ensued after the estate had been released a decree was obtained by the respondents against the appellant, the amount of which was eventually settled by order of the Court of the Judicial Commissioner to be Rs. 12,611-5-0. In execution of that decree a village, part of the appellant's estate, was attached with a view to sale

Present:—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

(1) (1916) 14 Oudh Cases, 6

1916

DAT BAHADUR SINGH v. SHADI LAL.

The appellant objected to the attachment on the ground that the village was property under the superintendence of the Court of Wards at the time the money was borrowed, and the borrowing was by a person whose property was under such superintendence at the time of the contract to borrow and it could not therefore be attached in execution of the decree by reason of section 174 of the Court of Wards Act (XVII of 1879).

The Subordinate Judge held that the estate was only protected from attachment while under the Court of Wards' superintendence, which had ceased long before execution proceedings were commenced, and he accordingly held that the village was liable to attachment in execution of the decree.

On appeal the Court of the Judicial Commissioner (Mr. L STUART, 1st Additional Commissioner, and Mr KANHAIYA LAL, 2nd Additional Judicial Commissioner) affirmed the decision of the Subordinate Judge. They said:

"Mr. Sen, who has argued the appeal on behalf of the appellant, has referred us to the ruling in *Ram Parshad* v. *Mana Kuar* (1) and to the ruling in *Hiranchal Singh* v. *Hanuman Lal* (2) and *Dhanman Lal* v. *Hiranchal Singh* (3). The last of these rulings was passed on the 17th of August, 1901. He argues that as a decree under a person's property has been taken under the management of the Court of Wards, a decree obtained in respect of a debt contracted by such a person while his property is under the management of the Court of Wards, cannot be executed against the property of such person after that property has been released in so far as the provisions of Act XVII of 1879 and Act XIX of 1873 affect the case. Had these rulings stood alone, Mr. Sen's arguments might have prevailed. We find, however, that a Bench of this Court decided on the 24th of November, 1910, in *Ramadhar Rakhit Singh* v. *Dhanpat Dat* (4) that property so released is liable to attachment in execution of a decree obtained on a debt contracted while the property was under the management of the Court of Wards. On page 8 occur the words:—"It is quite clear that under the old Act a creditor could obtain a decree upon a bond given by a ward while his property was under the superintendence, and execute that decree against the property of the ward after the property was released from superintendence." This is a ruling of a Bench of this Court. It over rules the ruling in *Ram Parshad* v. *Mana Kuar* (1), which was a ruling of a single Judge of this Court, and we consider it to be binding upon us. As this is a case falling under the old Act, we decide this point against the appellant."

(1) (1900) 4 Oudh Cases, 25
(2) (1900) I. L. R., 22 All., 364
(3) (1901) I. L. R., 24 All., 181.
(4) (1910) Oudh Cases, 28

1916

Hira Ballabh Singh v. Sheo Lal

On this appeal which was heard *ex parte*

De Gruyther, K. C., and *S. A. Kaffin* for the appellants contended that the village in question was not liable to attachment; and the courts below were wrong in holding that it could be so taken in execution of the decree. Section 173 and 174 of the Oudh Land Revenue Act (XVII of 1876) were referred to; the latter section expressly prohibited any such thing. Where a charge has been created on property under the provisions of the Court of Wards in respect of a contract entered into by a person whose property is under such superintendence, and a decree has been made so as to create a legal charge on the property cannot be attached in execution of the decree even after the property has been released from such superintendence, and section 174 bears no other construction. That has been decided. Under the N.-W. P. Land Revenue Act, section 248, as amended by N.-W. P. Act VIII of 1901, section 93, in terms identical with section 174 of Act XVII of 1876. Reference was made to *Himmehal Singh* v. *Jhamman Lal* v. *Himmehal Singh* (2); and *Kunj Lal* v. *Muna Kuar* (3). The case of *Ramadhar Rakhi Singh* v. *Dhanpal Das* (4), by the decision in which the Commissioner's Court considered itself bound, was wrongly decided, and was more by an *obiter dictum* and did not in that case arise for decision. Reference to section 34 of Act III of 1899 (United Provinces Court of Wards Act); and the case of *Maneshar Bakhsh Singh* v. *Lal* The provisions in all these Acts were made to protect the property of the disqualified proprietor and his [illegible] by persons from were opposed to that principle and the [illegible]

1916, March 14th.—The judgment of the Lord [illegible] was delivered by Lord SHAW:—

By section 162 of the Oudh Land Revenue Act, XVII of 1876, certain persons are declared to be disqualified from managing their estates. Among the [illegible] persons are the following: Under [illegible]

(1) (1900) I. L. R., 22 All., 364. (3) (1900) 4 Oudh Cas. [illegible]
(2) (1901) I. L. R., 24 All., 136. (4) (1910) 14 Oudh Cas. [illegible]
(5) (1909) I. L. R., 32 All., 386: L. R., [illegible]

1916

DEBI PARSHAD SINGH v. SHADI LAL.

declared by the Chief Commissioner on their own application to be disqualified from managing their estates." The Talukdar of Mallanpur was one of those persons. On his application his estates were assumed by the Court of Wards and they remained under the management of that Court from the year 1896 until the year 1898.

During that period the Raja borrowed certain sums of money, and on the 12th of August, 1904, his creditors sued and obtained a personal decree against him in the Court of first instance. There were certain judicial proceedings which occurred subsequent to the decree; and it may be of interest to note that, the debt incurred having been originally a sum of Rs. 4,000, execution is now sought to be obtained against the property put under the management of the Court of Wards for a sum which, at a date somewhat anterior to the present deliverance, amounted to Rs. 21,526, the interest having been running for a certain course of years at the rate of 18 per cent. per annum.

The question in this case, and the sole question, is whether a decree obtained for such sums can be put in execution against the property, which was, at the date of the contraction of the debt, under the management of the Court of Wards.

The sections of the Oudh Land Revenue Act to which reference has been made, are sections 173 and 174. Section 173 is in these terms:—"Persons whose property is under the superintendence of the Court of Wards shall not be competent to create without the sanction of the Court, any charge upon or interest in such property, or any part thereof." Section 174 says:—"No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence." Their Lordships think that it falls to be observed that the object of these sections was the protection of the property against either transactions entered into by the person under tutelage by way of direct transactions of sale or of mortgage, and also the protection of the property against the consequences of any execution in respect of contracts entered into by a person under such tutelage. Section 174 deals with the latter situation.

The courts below have permitted execution against the property to be granted in respect of this debt—a debt incurred by a person under tutelage. The question is whether that decision is sound in law. There have been various decisions in the Courts in India, notably in Allahabad, which appear fully to support the appeal. But there is one dictum which is founded upon by the Court below which seems to have ruled the minds of the learned Judges in consenting them to give effect to the execution against the property in respect of this debt. The dictum is contained in the case of *Rameshar Bakhsh Singh* v *Dhanpal Das* (1). It was quite unnecessary, in the view that their Lordships take for the decision of the case, which depended, as it was viewed by the court who decided it, merely upon the construction of a certain decree. That dictum was to the following effect:—"It is quite clear that, under the old Act"—and the reference is either to this Act or an Act in similar terms—"a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence, and execute that decree against the property of the ward after the property was released from superintendence."

Their Lordships are clearly of opinion that this dictum was an unsound proposition in law. They think that, the object of the Act being the protection of the property, a person subject to the Court of Wards would in no sense be protected if this dictum were to be affirmed. What has been done in the present case seems to their Lordships to be a total violation, not only of the spirit of the Statute, but of the express provision of section 174. The phrase in that section, "while his property is under such superintendence," is, in their Lordships' opinion, a phrase annexed to and adjunctive of the verbal expression "contract entered into by any such person." Section 174 is meant to protect property against the execution of a decree made in respect of "any contract entered into" during a certain period of time, namely, while the property is under such superintendence. If such a contract, incurring of debt, or transaction occurred during that time, the law of Oudh is plain under section 174, to the effect that the property is protected against execution in respect

(1) (1901) 4 Oudh Cases, 6.

1916

DEB PARSHAD SINGH v. SHADI LAL

of any decree following upon that transaction, that debt or that contract

There is nothing further in the case, and their Lordships will humbly advise His Majesty that this appeal should be allowed with costs.

Appeal allowed

Solicitors for the appellant —*T. L. Wilson* and *Co.*

J. V. W.

1916

January, 19

REVISIONAL CRIMINAL.

Before Justice Sir George Knox

EMPEROR v BHAWANI DAT.

Act No XLV of 1860 (Indian Penal Code), section 498—Criminal Procedure Code, sections 4, 190, 203(i)—Complainant—Statement made as Court as a witness.

Where in a proceeding instituted by the police under section 366 of the Indian Penal Code, the husband of the woman appeared as a witness and asked the Magistrate trying the case to drop the proceedings under section 366 as he intended to prosecute the accused under section 498 of the said Code, it was *held* that the statement made by the husband, as a witness, fell within the definition of complaint as defined in section 4, clause (*h*) of the Code of Criminal Procedure and therefore a conviction under section 495, treating the statement made by the husband as a complaint, was legal *In the matter of Tipale Reddi* (1) and *Queen Empress* v. *Kunjla* (2) referred to

THE facts of this case were as follows :—

One Bhawani Dat was charged with an offence under section 366 of the Indian Penal Code. The husband was not a complainant; apparently the police took up the case, but the husband appeared as a witness. While the case was proceeding under section 366 of the Indian Penal Code, he gave his evidence on the 6th of July, 1915. In the *interim* apparently he had asked that the proceedings under section 366 should be dropped, but when examined on the 6th of July he explained that his action in this matter was due to deception practised on him by one Ratti Ram, and he said in most emphatic terms, both in the examination in chief and in cross-examination, that he wished to prosecute the accused

* Criminal Revision No. 529 of 1915, from an order of W. J. D. Burkitt, Sessions Judge of Kumaun, dated the 5th of October, 1915

(1) (1872) I. L. R., 5 Mad., 273 (2) (1900) I. L. R., 23 All., 52

1916

EMPEROR v. BHAWANI DAS.

The magistrate treated this statement as a "complaint" and convicted the accused under section 498 of the Indian Penal Code. The Sessions Judge rejected his appeal. Thereupon he applied to the High Court in revision.

Mr. *A. H. C. Hamilton*, for the petitioner :—

The case was instituted by the police under section 366, Indian Penal Code. The application of the husband that proceeding should be dropped was rejected. The conviction is under section 498, Indian Penal Code. There has been no formal complaint by the husband, and in the absence of such complaint the lower courts had no jurisdiction, by reason of sections 190 and 238 (3), Criminal Procedure Code, to convict under section 498, Indian Penal Code. Moreover, under section 190, Criminal Procedure Code, cognizance of an offence can only be taken upon receipt of a complaint of facts which constitute such offence. "Complaint" has the same meaning as section 190 of the Criminal Procedure Code as in the definition given in section 4 (1), clause (*h*) of the Criminal Procedure Code; *Tara Prosad Laha* v. *Emperor* (1). The lower courts have wrongly treated the husband's deposition as a complaint, holding it to be "an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code," but it is clear that this definition relates to preliminary proceedings and cannot apply to an allegation made when the trial under section 366, Indian Penal Code, is almost complete. All the High Courts are agreed that the husband's deposition in such circumstances cannot be regarded as a complaint. *Empress of India* v. *Kallu* (2); *Chenvan Gavo* v. *Emperor* (3); *Emperor* v. *Isap Mahomed* (4); *Bangaru Asari* v. *Emperor* (5). The statement is merely the statement of the complainant as a witness, it may be the narration of an offence under section 498, Indian Penal Code, but it is not a complaint nor a statement in examination under section 200 of the Criminal Procedure Code. Even where there has been a complaint by the husband, the facts related must have special reference to an offence under section 498,

(1) (1903) I. L. R., 30 Calc., 910.
(2) (1882) I. L. R., 5 All., 233.
(3) (1902) I. L. R., 29 Calc., 415.
(4) (1905) I. L. R., 31 Bom., 318
(5) (1903) I. L. R., 27 Mad., 61

1916

EMPEROR v. BHAWANI DAT.

Indian Penal Code, otherwise there would be no difference of procedure between the classes of cases referred to in sections 193 and 199, Criminal Procedure Code, and other cases not included in these sections: *Queen Empress* v. *Deokinandan* (1). As no complaint, apart from the deposition, has ever been made, it is unnecessary to discuss the authorities dealing with cases where the facts alleged by the husband complainant have been described by him as falling under one section of the Penal Code whereas the court has been of opinion that they fell under another.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KNOX, J.—The accused, Bhawani Dat, has been convicted of an offence under section 498 of the Indian Penal Code. He presented an appeal from his conviction and sentence, but the appeal was rejected. He comes in revision to this Court. The grounds he puts in revision are (1) that, as the husband has never made any complaint, the courts, by reason of sections 199 and 288 (3) of the Criminal Procedure Code, were debarred from taking cognizance of an offence under section 498, Indian Penal Code, (2) that the husband's petition, dated the 18th May, shows that the court proceedings initiated by the police, were continued in spite of his desire to the contrary; (3) that the circumstance that the husband appeared as a witness for the prosecution in the proceedings under section 366, Indian Penal Code, cannot be regarded as amounting to the institution of a complaint of an offence under section 498, Indian Penal Code, nor can his deposition cure the initial omission to present a formal complaint having special reference to an offence under section 498.

There was a further plea, but it was not argued. On looking to the record I find that the case brought before the courts was a case in which Bhawani Dat was charged with an offence under section 366 of the Indian Penal Code. The husband was not a complainant; apparently the police took up the case; but the husband appeared as a witness. While the case was proceeding under section 366 of the Indian Penal Code, he gave his evidence on the 6th of July,

(1) (1887) I. L. R., 10 All., 130, (43).

1915 In the interim apparently he had asked that the proceedings under section 366 should be dropped, but when examined on the 6th of July, he explained that his action in this matter was due to deception practised on him by one Ratti Ram. Both the courts below have believed him on this point and I agree with them in this view and hold that the application, whatever its value may be, was an application procured by fraud. Now on the 6th of July, Bahadur Singh in most emphatic terms says that he wishes to prosecute the accused. In cross-examination he repeats it and says he wishes that the accused should be punished. It is contended that this statement made in the deposition cannot be regarded as a complaint and that no case under section 493 can be entertained unless and until there is a complaint made by the husband or the woman or in his or her behalf by some person who had care of the woman on his behalf at the time when such offence was committed. On turning to section 4 (*h*) I find that "complaint" includes "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence." I consider that the words used by Bahadur Singh on the 6th of July fall within the definition of "complaint" contained in the Code.

1915

EMPEROR v. BHAWANI DAS

Authorities have been cited to me which take an opposite view. The case of *In the matter of Ujjala Bewa* (1), is an authority in the contrary direction, and so to my mind is a case of the Court (*Queen-Empress* v. *Kangla* (2), in which the accused was charged with an offence under section 457 with intent to commit theft. It was proved to the satisfaction of the Magistrate that the accused did enter the house of complainant in order to commit adultery with the wife of complainant and the conviction was a conviction of having entered the complainant's house in order to commit adultery. The learned Judge of this Court refused to interfere.

The present case is one in which I think I ought not to interfere. I have not the least doubt that the husband did intend that the accused should be prosecuted for an offence under section 493 and that he made an allegation before the

(1) (1878) 1 C. L. R., 523. (2) (1890) I. L. R., 23 All., 82.

1916

EMPEROR v. BHAWANI DAT

Magistrate that the offence should be inquired into. I am not prepared to exercise my revisional powers and I dismiss the application.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Walsh.

1916 January, 21

PALLIA (PLAINTIFF) v. MATHURA PRASAD (DEFENDANT) *

Civil Procedure Code (1908), *order XLVII, rule 3*—*Review of judgement*—*Second application for review*—*Practice.*

Semble—that there is nothing in the Code of Civil Procedure which prevents a second application for review being made after a previous application for review has been made and rejected. *Gajanda Ram Mondal* v. *Bhola Nath Bhatia* (1) referred to.

In a suit on a promissory note the defendant pleaded that the plaintiff was a minor at the date of the making of the note and hence incompetent to enter into a contract. The first court upheld this plea and dismissed the suit. On appeal, the District Judge reversed the finding as to the plaintiff's minority and decreed the suit. Afterwards the defendant made an application to the District Judge for review of judgement on the ground of the discovery of new and important evidence, namely a *patra* or entry relating to the date of the plaintiff's birth. That application was disallowed. Some time later, a second application for review of judgement was made by the same party on the ground of the discovery of an application which had been made under the Guardian and Wards Act for the appointment of a guardian of the plaintiff, together with the certificate of guardianship granted thereon. This second application was allowed. Hence the appeal.

Mr. *M. L. Agarwala*, for the appellant :—

A second application for review of the same judgement does not lie under the Civil Procedure Code. The provisions of section 114 and of order XLVII, Civil Procedure Code, contemplate and allow only one review of a judgement. To hold otherwise would put no limit to the plurality of reviews of the same

* First Appeal No. 133 of 1915, from an order of Guru Prasad Dube, Additional Subordinate Judge of Bareilly, dated the 23rd of June, 1915.

(1) (1888) I. L. R., 15 Calc., 432.

judgement; *Vencama Shetty* v. *Pamoo Shetty* (1). A second application for review is tantamount to a review of a review which is expressly prohibited by order XLVII, rule 9. The judgement passed after the first review takes the place of the original judgement and the second application would be really to review the first review. He then argued on the merits of the application.

Babu *Sital Prasad Ghosh*, for the respondent:—

A second application for review of judgement on the discovery of new and important evidence which was not available to, or within the knowledge of, the applicant at the date of the first application for review is not prohibited by the Code; *Gobinda Ram Mondal* v. *Bhola Nath Bhatta* (2) and *Surrut Coomari Dassee* v. *Radha Mohun Roy*. (3) The latter case, though not decided under the Code itself, supports me in principle. He then argued on the merits of the case.

TUDBALL, J.—This appeal arises out of an order granting an application for review of judgement. The facts of the case are as follows:—One Mathura Prasad, the respondent before us, executed a promissory note in favour of one Shiam Behari. The latter died and his widow Musammat Parbha, the appellant before us, sued to recover the debt. One of the pleas taken in defence was that at the time when the money was lent, or said to have been lent, Shiam Behari was a minor and therefore the transaction was void. The court of first instance dismissed the suit. The court of appeal, on the 18th of June, 1914, decreed the suit. Shortly afterwards the defendant Mathura Prasad applied to the court for review of judgement on the ground of discovery of new and important evidence which he was unable to produce before the court at the hearing of the case. That evidence apparently was a *patra*. The court rejected the application on the 14th of November, 1914. On the 23rd of April, 1915, Mathura Prasad put in a second application for review of the judgement of the 18th of June, 1914, on the ground that he had discovered some fresh evidence, namely, an application by the grandfather of Shiam Behari to be appointed guardian of Shiam Behari and a certificate of guardianship granted by the District Judge which went to

(1) (1870) 5 Mad. H. C. Rep. 343. (2) (1908) I. L. R., 35 Calc., 432.
(3) (1825) I. L. R., 22 Calc., 764.

1916

PARBHA v. MATHURA PRASAD

show that Sham Behari was a minor at the date of the transaction. Musammat Parbha objected that no second application for review could under the law be made; secondly, that the application was out of time and that sufficient cause had not been shown and, thirdly, that the evidence was inadmissible and could not be considered. The court below decided in favour of the applicant, Mathura Prasad, and granted the application. Musammat Parbha has come here on appeal and the same three points are raised before us. In regard to the first point that no second application for review could be entertained by the court below, I find it unnecessary, in the view I have taken of the merits, to decide this point. But I may say that I should find it difficult to come to any other decision than that which was arrived at in the case of *Golendra Ram Mondal* v. *Bhola Nath Bhattia* (1). It is clear to me that the application for review ought to have been rejected by the court below. I have examined the evidence produced by the applicant in the court below. He examined himself and one Ram Sahai to show to the court the manner in which he discovered the present evidence. The statement of these two persons is simply to the effect that Mathura Prasad went to Ram Sahai to borrow from him some money to pay the decree, whereupon Ram Sahai pointed out to him that no decree ought to have been passed as Sham Behari was a minor and his grandfather Saya Mal had regularly been appointed guardian by the District Judge. Thereupon Mathura Prasad made inquiries through a pleader and discovered the statement to be correct, whereupon he made the second application for review. Now Ram Sahai is related to Mathura Prasad. At the hearing of the original suit one Brij Lal was a witness on behalf of Mathura Prasad. The latter has admitted that Brij Lal and he were partners in a business and also that Brij Lal and Sham Behari, the alleged minor, were relations and co-sharers in the same property. Mathura Prasad has not attempted in his evidence to show that he made any attempt or exercised any diligence whatsoever in seeking for the evidence which he has now produced to establish the minority of Sham Behari. The Judge in the court below seems to have been satisfied by holding that Mathura Prasad had no previous

(1) (1883) I. L. R., 10 Calc., 432.

knowledge of the evidence. Of course it is highly probable that he had no such knowledge; but order XLVII, rule 1, distinctly lays down that any person considering himself aggrieved by a decree or order and who from discovery of new and important matter or evidence *which after the exercise of due diligence was not within his knowledge* or could not be produced by him at the time when the decree was passed, may apply for a review of judgement to the court which passed the decree or order. The circumstances of the case seem to me to be such that if Mathura Prasad had exercised any diligence whatsoever the evidence which he now wishes to tender could easily have been discovered by him. The parties reside in Bareilly and are greatly concerned with each other. The court of the District Judge is within a mile of Mathura Prasad's residence, and I find it impossible to hold that Mathura Prasad exercised due diligence in the matter. The third point raised relates to the admissibility of the evidence which Mathura Prasad has given. In the circumstances of the case it is unnecessary to enter into the question or decide it. The result is that I would allow this appeal and set aside the order of the court below with costs here and in the court below.

WALSH, J.—I agree. I think the learned Judge unfortunately ignored the important words in the clause with which he was dealing and under which the application for review was made to him, namely, "after the exercise of due diligence." Now those words are put there for excellent reasons. The party who fails to get necessary evidence for the original trial and therefore fails in the suit is given certain privileges and an opportunity to get his case re-heard. He is not entitled to ask for those privileges unless he satisfies certain clear statutory requirements. One of those requirements, in justice to the other party, is that he must have exercised due diligence in the preparation of his case. Now the question whether he has exercised due diligence or not involves two inquiries. The first is as to what he might have done, and the second is as to what he has in fact done. As my learned brother has pointed out, this was a question merely of the discovery of a certificate of guardianship in the city of Bareilly where the applicant resided. He had ten months to make the discovery. Unfortunately in the judgement before us the learned

1916

PALOJA v. MATHURA PRASAD.

Judge does not appear to have directed himself either to the question of what he might have done, or to the question of what he did, and in quoting the rule under which he was exercising his jurisdiction he left out that important requirement. His order cannot be supported.

I agree with my learned brother's view as regards the Calcutta decision . . . . I think that in cases where no question of principle, but only a question of practice or procedure arises, it is well to follow the decisions of the High Courts in other provinces as far as possible and having regard to the fact that the decision of the Calcutta Bench was passed as long as thirty-three years ago, speaking for myself, I should prefer to follow and adopt that ruling.

BY THE COURT.—The appeal is allowed and the order of the court below is set aside with costs in both courts.

Appeal allowed.

1916

January, 18

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v. MURLI DHAR AND ANOTHER.*

Act No. XLV (Indian Penal Code), section 223—Intentional insult to an officer sitting judicially—Application for transfer.

An accused person in an application for transfer of the case pending against him made an assertion to the effect that the persons who named the proceeding to be instituted were on terms of intimacy with the officer trying the case and that therefore he did not expect a fair and impartial trial. *Held* that, there being no intention on the part of the applicant to insult the court, but merely to procure a transfer of his case, he was not guilty of an offence under section 223 of the Indian Penal Code. *Queen-Empress v. Abdulla Khan* (1) followed.

THE facts of this case were as follows :—

One Murli Dhar was being tried along with others by a Deputy Magistrate under section 107 of the Code of Criminal Procedure. During the trial Murli Dhar and his son Ganga Ram presented to the Magistrate an application for an adjournment

* Criminal Revision No. 908 of 1915, from an order of L. Johnston, Sessions Judge of Meerut, dated the 10th of March, 1915.

(1) Weekly Notes, 1893, p. 145.

of the case on the ground that they were intending to apply for transfer of the case to another court. In this application they stated that the persons who had caused proceedings under section 107 to be instituted against the petitioners were friends of the Magistrate and therefore they had apprehension that they would not get a fair and impartial trial in the court of the said Magistrate. On this application the Deputy Magistrate instituted proceedings under section 228 of the Indian Penal Code, and convicted the petitioners. The Sessions Judge upheld the conviction on appeal. The petitioners thereupon applied to the High Court in revision.

1911

EMPEROR v. MUKH DHAR

Mr. *J. M. Banerji*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGOTT, J.—Mukh Dhar and Ganga Saran have been convicted of an offence under section 228 of the Indian Penal Code in consequence of certain expressions used by them, while occupying the position of accused persons, in the course of a petition presented to a court. The immediate object of this petition was to obtain an adjournment of the case on the ground that the persons accused were intending to apply for transfer of the proceedings to another court. The petition was not happily worded, and as a matter of fact there was no obligation on the petitioners to explain to the court at all the grounds on which they intended to apply for the transfer. The question, therefore, is whether it follows as a fair presumption from the wording of the petition that the intention of the persons presenting the same was to offer insult to the presiding officer of the court. The learned Sessions Judge in affirming the conviction admits that his attention was called to the case of *Queen-Empress* v. *Abdulla Khan* (1), and has taken it upon himself to hold that that case is not of general application and that, if the same point were again raised before this Court, it would be differently decided. The learned Sessions Judge was not entitled to deal with a decision of this Court in this fashion. The present case is a much weaker one against the applicants than was the case of *Abdulla Khan*. I cannot say that, if I had been sitting as a Magistrate to try a gentleman known to be a personal friend of mine on a criminal charge, I

(1) Weekly Notes, 1898, p. 145.

1916

EMPEROR v. MURLI DHAR.

should have considered myself insulted by the presentation of a petition in the language of that which has formed the basis of the present prosecution, though I might possibly have pointed out to the person responsible for the drafting that his object could be attained by a petition more courteously worded. I do not think this conviction can be sustained. I set it aside accordingly, acquit Murli Dhar and Ganga Saran of the offence charged and direct that the fine, if paid by them, should be refunded.

Conviction and sentence set aside.

1916

February, 11

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox and Mr. Justice Piggott.

RANGI LAL AND ANOTHER (PLAINTIFFS) v. JAGAN NARAIN AND OTHERS (DEFENDANTS).* *Act (Local) No III of 1901 (United Provinces Tenant Relief Act), sections 36 and 68—Cash—Rent—Rent payable partly in cash and partly in kind.*

Certain tenants holding under a *qabúlat* agreed to pay yearly a fixed sum in money and also certain quantities yearly of wheat, *chana*, *gur* in cash sugarcane, calculated in the *qabúlat* at certain rates:

Held that in a suit to recover the payments in kind were included in "rents payable in cash" they were nevertheless part of the rent and could be recovered by the lessor, and did not fall within the purview of section 36 or section 68 of the United Provinces Tenant Relief Act, 1901. *Sita Ram v. Joyhar Ali* (1) distinguished.

THE facts of the case were as follows:—

The defendants in 1881 made a contractuary mortgage of their zamindari property to the plaintiffs, but later on resumed possession of the property on execution of a *qabúlat*, under which they consented to pay to the plaintiffs mortgagees, Rs 795 yearly, together with *nazrana zamindari* detailed at the foot of the deed, which consisted of a certain quantity of *charri*, *bhusa*, maize, *kalu* and sugarcane. The suit was brought by the plaintiffs in the Revenue Court to recover arrears of rent for 1319 and 1320 Fasli, including both the cash rent and the items of

* Second Appeal No 1475 of 1914, from a decree of A. G. P. Fuller, District Judge of Saharanpur, dated the 23rd of July, 1914, modifying a decree of Bir Narain Singh, Assistant Collector, first class, of Saharanpur, dated the 27th of June, 1913.

(1) (1914) I. L. R., 36 All., 19.

1916

RANGI LAL v. JABBA.

rasum zamindari, which were valued at Rs. 43 per year. The court of first instance decreed the suit, assessing the items of *rasum zamindari* at Rs. 24 a year. On appeal the District Judge dismissed the claim for the Rs. 43 on the ground that the *rasum zamindari* mentioned in the *qabuliat* was a cess and consequently not recoverable. He relied on the case reported in I. L. R., 35 All., p. 19. The plaintiff appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant :—

The suit was brought in the Revenue Court for the recovery of rent which the defendants under the *qabuliat* had agreed to pay. The defendants had undertaken to pay a certain amount in cash and some agricultural produce in kind and the whole constituted "rent" within the meaning of the expression as defined in the Tenancy Act. Anything which is claimed under an agreement to pay is not a cess but a rent. The claim in the present case is not based on any village custom, and consequently section 36 of the Land Revenue Act is not applicable. Nor is there any claim to recover anything payable "in addition to rent," and consequently section 56 of the Land Revenue Act is not applicable. The whole claim is for rent, and the mere use of the words *rasum zamindari* makes no difference. In the absence of an agreement, the items would not be recoverable, but if a tenant agrees to pay certain agricultural produce as part of his rent, there is no bar to its recovery. The case reported in I. L. R., 35 All., 19, is distinguishable as the suit was brought in the Civil Court, which showed that the plaintiff treated the amount claimed not as 'rent' but as 'cess.' There are some reported cases which give some indication of what a cess is; I. L. R., 32 All., 193.

Mr. *Nihal Chand*, for the respondent :—

The *qabuliat* has to be read as a whole in order to ascertain whether the parties really intended the items mentioned as *rasum zamindari* to be rent: The deed provided for certain remedies on failure to pay the *money fixed*, which went to show that the items over and above the cash rental were something other than rent. The use of the expression *rasum zamindari* clearly showed that the items were claimed as 'cess' and

1916

RANGI LAL v. JASSA.

were agreed to be paid as 'cess' and such an agreement, being contrary to the provisions of the Land Revenue Act was not enforceable.

Babu *Piari Lal Banerji*, was not heard in reply.

RICHARDS, C. J., and KNOX and TUDBALL, JJ.:—This appeal arises out of a suit for rent in the Revenue Court. The facts are that the plaintiffs, or their representatives, having lent money to the defendants, or their representatives, took a usufructuary mortgage of certain zamindari property. The mortgagees then made a letting of the property to the defendants on the terms that the defendants should pay a certain sum in cash (which included a sum sufficient to pay the Government revenue). In addition to this they agreed to deliver a certain amount in *bhusa, chari*, grain and sugarcane. In the *qabuliat* the expression "*rasum zamindari*" is used. The court of first instance found in favour of the plaintiffs, but calculated the value of the produce at Rs. 24 per annum. The plaintiffs claimed interest on all the arrears of rent from the time they became due up to the time that they were paid. This included interest on a sum of Rs. 200 which the defendants paid into court. The first court disallowed the interest on the Rs. 200 even prior to the suit. The plaintiffs appealed and contended that the value of the produce was more than Rs. 24 per annum. They further contended that they were entitled to interest on the Rs. 200 which had been disallowed by the court of first instance. The defendants filed a cross appeal on the strength of the ruling in *Sis Ram* v. *Asghar Ali* (1) and they contended that having regard to the provisions of the sections 56 and 86 of the Land Revenue Act the plaintiffs were not entitled to the *bhusa*, and other produce which we have mentioned. This contention found favour with the lower appellate court, which disallowed the plaintiffs' claim in respect of the *bhusa, etc.* The plaintiffs come here in second appeal and contend that the court below was wrong in disallowing their claim for the *bhusa, etc.*, and also that they should have the interest which the court of first instance had disallowed them. On the first point, namely, the liability of the defendants to deliver the *bhusa, etc.*, or to pay its equivalent in

(1) (1914) I. L. R. 36 All., 19

cash, we think the court below was wrong. It is quite clear on the construction of the *qabuliat* the defendants agreed to deliver the produce as part of their rent. The suit was brought in the Revenue Court and the claim which the plaintiffs made to it was as rent. In the ruling referred to the plaintiffs sued in the Civil Court to recover the *rasum zamindari* as something over and above the rent. The ruling accordingly does not apply. On the second point we think that the plaintiffs were entitled to the interest on the Rs 200 up to the time of payment into court. The parties very properly, instead of prolonging the litigation have agreed to a lump sum for the interest and the value of the produce. We allow the appeal, set aside the decree of the court below and restore the decree of the first court with Rs. 10 added. We wish to say that the calculation of Rs 24 as the value of the produce is not to be taken as a final decision, that this is the value for all time. The value will necessarily vary in different years. The appellants will have their costs both in this and the lower appellate court.

Appeal allowed.

APPELLATE CIVIL.

1916
February, 11

Before Mr. Justice Piggott and Mr. Justice Walsh.

TAI SINGH (JUDGEMENT-DEBTOR) v. JAGAN LAL (DECREE-HOLDER) *

Civil Procedure Code (1908), *order XXI, rule 16—Execution of decree—Res judicata.*

On application by a person to have his name substituted as decree-holder upon the ground that he was in fact the true owner of the decree, an order was passed, after notice to the judgement-debtor, permitting the applicant to execute the decree as the transferee. *Held* on application for execution of the decree that the judgement-debtor was not entitled again to raise the question of the validity of the transfer of the decree to the applicant. *Oman Prasad* v. *Dalab Sharkar* (1) followed.

THE facts of this case were as follows :—

A mortgage deed was passed in favour of one Dale Ram in 1911. After his death his son Lalu Mal applied for a decree absolute, which was passed in 1912. The respondent Jagan Lal brought a

* First Appeal No. 175 of 1915, from a decree of Ganga Sahai, Subordinate Judge of Moradabad, dated the 17th of April, 1915.

(1) (1914) 12 A. L. J., 203.

1916

TAJ SINGH v. JAGAN LAL.

regular suit against the said Lallu Mal and others to have it declared that he was the real owner of the decree. This suit was decreed in 1914. The appellant Taj Singh, who was the purchaser of a portion of the mortgaged property, was not a party to this suit. In 1914, Jagan Lal applied under order XXI, rule 16, for permission to execute the mortgage decree on the ground of his being the real owner. Taj Singh had notice of this application, but raised no objections at that time. On a subsequent application for execution Taj Singh raised two objections; (1) that his liability under the decree had been discharged by payment to Dule Ram; and (2) that Jagan Lal's suit was fraudulent and collusive and he was not the owner of the decree. The trial court held that the alleged payment not having been certified could not be recognized and that the objection to Jagan Lal's title not having been raised at the proper time could not be raised now. Taj Singh appealed to the High Court.

Maulvi *Shafi-ur-zaman*, for the appellant :—

An application under order XXI, rule 16, is an application for execution of a decree. No separate application for substitution of the name of the real owner of the decree is either required by that rule or was made by Jagan Lal. The proceedings were proceedings in execution of a decree, and it has been held that explanation IV of section 11 of the Code of Civil Procedure does not apply to such proceedings; so that, if a judgement-debtor omits to raise an objection at an early stage of the execution proceedings, he is not thereby estopped from raising it at a subsequent stage of the execution. It would of course be different if the appellant had raised the objections now put forward and they had been decided against him. There has not yet been any adjudication upon the merits of the objections, and they are not barred by the principle of *res judicata*: *Kalian Singh* v. *Jagan Prasad* (1), *Ram Kirpal* v. *Rup Kuari* (2). I am entitled to raise the objection as to part satisfaction, which really amounted to a relinquishment so far as the appellant's share in the property is concerned.

(1) (1916) I. L. R., 37 All., 589. (2) (1883) I. L. R., 6 All., 233.

1916

TAI SINGH v. JAGAN LAL.

The Hon'ble Dr. *Sundar Lal*, for the respondent, was not called upon, but mentioned the case of *Oman Prasad* v. *Durlab Shankar* (1).

PIGGOTT and WALSH, JJ. :—There was a decree passed nominally in favour of one Dule Ram. The respondent Jagan Lal, in the course of a suit against Dule Ram's heirs, obtained a decree to the effect that he was himself the beneficial owner of the decree. Having applied to the proper court for that purpose, he obtained an order under order XXI, rule 16, of the Code of Civil Procedure granting him permission to execute the decree as transferee of the same. Before that order was passed the present appellant, who was on the record as one of the judgement-debtors, had received notice of Jagan Lal's application. He took no objection to the same and submitted to the order granting the said application. Subsequently Jagan Lal applied to the Court to take certain steps to execute the decree by sale of the property concerned. Thereupon the appellant filed an objection in which he said, firstly, that Jagan Lal was not a genuine transferee of the decree, because the whole proceedings between Jagan Lal and the heirs of Dule Ram were collusive and were not binding on him. On this the court below has held that this was an objection which should have been taken in reply to Jagan Lal's application under order XXI, rule 16, and not having been so taken, it was concluded against the present appellant by the order of the court bringing Jagan Lal on the record as transferee of the decree. This decision is supported by a ruling of this Court in *Oman Prasad* v. *Durlab Shankar* (1), with which we are in agreement. The other point taken by the appellant was that there had been an adjustment of the decree, so far as he himself was concerned, between himself and Dule Ram, during the life-time of the latter. On this the court below has held that this adjustment, never having been certified to the court, cannot be recognized by the court executing the decree. This order is in accordance with the clear provisions of order XXI, rule 2, of the Code of Civil Procedure and we find it to be correct. This appeal therefore fails and we dismiss it with costs.

Appeal dismissed.

(1) (1914) 12 A. L. J., 209

Before Mr. Justice Tudball.

1916
February, 12.

NIHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* SHIWA RAM AND OTHERS (DEFENDANTS)*

Act No. VII of 1870 (Court Fees Act), section 7, clauses v and xv—Court fee—Suit for specific performance of contract to sell and for possession.

The plaintiffs alleged that the defendants Nos. 2 and 3, having contracted to sell certain property to them and received part of the price thereof, sold the same property to defendant No. 1, who had notice of the said contract with the plaintiffs, and they asked (1) that the defendants 2 and 3 might be compelled to complete the sale to the plaintiffs and (2) for possession of the property. *Held* that the suit was really one for specific performance of a contract and the correct fee thereon was recievable under section 7, clause iv, cl. (c) of the Court Fees Act, 1870. *Mahi-ul-lah Ahmad Khan v. Megha Ram* (1) referred to.

THIS was a reference by the Taxing officer of the Court under section 5 of the Court Fees Act, 1870.

The facts of the case appear from the following orders.

Stamp Officer's report :—

"This appeal arises out of the following circumstances.—Defendant No. 2 owned a certain share out of zamindari property in mauza Barauli, pargana and district Mainpuri. He collusively executed a sale-deed in favour of his wife defendant No. 3. Defendants Nos. 2 and 3 entered into a contract with the plaintiffs to sell the aforesaid property, and for the completion thereof took Rs. 100 from plaintiff No. 2 and, having purchased a stamp paper, executed a sale-deed on the 9th of February, 1910. But as a sale-deed had been obtained by defendant No. 1, of which the plaintiffs came to know afterwards, the defendant No. 2 neither signed nor made his wife, defendant No. 3, sign the sale-deed. The plaintiff No. 2 sent a notice to defendant No. 2 on the 24th of May, 1910, asking him to complete the sale-deed within 15 days. Defendant No. 1 who had full knowledge of the said contract induced defendant 2 and obtained from him a sale-deed on the 8th of June, 1910. Although the plaintiffs exerted their best to stop the completion and registration of the sale-deed yet the sale-deed was eventually executed by defendant No. 2 in favour of defendant No. 1 in order to cause loss to the plaintiffs in spite of the knowledge and information of the aforesaid contract between the plaintiffs and defendants Nos. 2 and 3.

* Stamp Reference in Second Appeal, No. 1208 of 1914.

(1) (1886) I. L. R., 8 All., 231.

1916

NIHAL SINGH v. SEWA RAM.

On the facts briefly stated above the plaintiffs asked for the following relief:—

"After completion of a sale-deed by defendants 2 and 3 possession over the property in suit be awarded to the plaintiffs as against the defendants and Rs. 2,300, out of Rs. 2,900, the amount of consideration which is still in the plaintiffs' possession, be awarded to the right person, Rs. 100 having been paid already.

"The suit was valued for purposes of jurisdiction at Rs. 2,900, and for payment of court fee at Rs. 350, five times the Government revenue, and a court fee of Rs. 26-4 was paid on the latter valuation.

"The plaintiffs' suit having been dismissed by both the courts below, they have come up to this Court in second appeal putting the same valuation and paying the same court fee as in the courts below.

"It appears to me that this suit embraces two reliefs, one for specific performance of the contract of sale governed by section 7, clause x (*a*), of the Court Fees Act, and the other for possession of the property governed by section 7, clause x (*b*), of the Act and if the above view is correct, separate court fee must be paid on both the reliefs on the authority of the ruling in I. L. R., 18 Mad., 4.5. This being so a court fee of Rs. 170 is payable on the relief for specific performance of the contract of sale on the amount of sale consideration, i.e, Rs. 2,900, and a court fee of Rs. 26-4, is payable on the relief for possession of the property on Rs. 350, five times the Government revenue. In all a court fee of Rs. 196-4-0 is payable on the plaint. A court fee of Rs 26-4, having been paid, there is therefore a deficiency of Rs. 170 on the plaint, and the same amount is due in the lower appellate court and this Court.

"Total deficiency due from the plaintiffs appellants for all the three courts is Rs. 510."

On this the appellant's vakil recorded the following objection:—

"I do not accept the report of the Stamp Reporter. The court fee has been rightly paid. See 14 C. L. J., 159. The case in 18 Mad., has no application. The suit is in substance one for possession."

1916

NIHAL SINGH v. SEWA RAM.

Taxing officer's report :—

"The plaintiffs appellants in the court of first instance sought to compel the defendants Nos. 2 and 3 to complete a sale-deed with them and thereafter they sought to be put in possession of the property in suit on payment of the sum of Rs. 2,800 after deducting Rs. 100 already paid. The suit was valued for purposes of jurisdiction at Rs. 2,900, and for payment of court fee at Rs. 350, being five times the Government revenue, and a court fee of Rs. 26-4 was paid on the latter valuation.

"The plaintiffs' suit having been dismissed both by the court of first instance and by the lower appellate court, they have come up to this Court in second appeal asking that the decree of the lower courts be set aside and their suit decreed. They have put the same valuation on the appeal and are paying the same court fee as in the two courts below.

"It is quite clear from a perusal of the plaint in the court of first instance that the plaintiffs desire (*a*) specific performance of the contract of sale, viz., the completion of a certain sale-deed and (*b*) possession of the property in suit.

"The proper court fee on (*a*) according to section 7, clause x (*a*) of the Court Fees Act is an *ad valorem* court-fee on the amount of the consideration, the court fee on (*b*) is governed by section 7, clause v (*b*), and is payable on five times the Government revenue.

"It would appear quite clear that this suit embraces these two reliefs, and separate court fees must be paid on both. The stamp reporter quotes a ruling in *Krishnaswami* v. *Sundarappayyar* (1).

"This is not of great help as the case cited only shows that in a somewhat similar case the vendee sued (1) for the specific performance of the contract of sale and (2) for possession. On the other hand the learned counsel for the appellants who disputes the stamp reporter's report refers to a ruling in *Madan Mohan Singh* v. *Gaja Prasad Singh*, (2) where the Calcutta High Court has held that where the plaintiff not only seeks for specific performance of a contract of sale but also asks that the defendant may be compelled to execute a conveyance and to deliver possession

(1) (1894) I. L. R., 18 Mad., 415. (2) (1911) 14 C. L. J., 180

1916

MAHAL SINGH v. SIWA RAM.

of the property to him, the suit is in substance one for possession of the property and should be valued under section 7, clause v, of the Court Fees Act, according to the value of the subject matter.

"This Court has not published any ruling on the subject and I am in some doubt as to whether this Court will follow the ruling of the Calcutta High Court. As Taxing Officer I am of opinion that two separate court fees are payable on the claim for specific performance of the contract of sale as well as on the claim to be put in possession of the property in dispute.

"If the Court holds this view to be correct there is a total deficiency due from the plaintiffs appellants for all the three court of Rs. 510.

"The learned counsel will have an opportunity of arguing his case before the Bench hearing the appeal. I lay before that Bench for orders."

The matter was then laid before the Taxing Judge.

The Hon'ble Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju*, for the appellants.

Mr. *A. E. Ryves*, for the Crown.

TUDBALL, J.—This matter comes up before me on the report of the stamp officer. The facts are simple. The plaintiffs brought a suit on the following allegations:—Defendants Nos. 2 and 3 contracted to sell to them certain zamindari property for the sum of Rs. 2,700. Of this sum Rs. 100 was paid as earnest money. The defendants 2 and 3, however, failed to carry out their contract, but instead they executed a sale-deed in favour of defendant No. 1. The defendant No. 1 had full knowledge of the contract between plaintiffs and the defendants 2 and 3. The plaintiffs, therefore, ask for specific performance of the contract including possession of the property. The court fee paid in the courts below was that calculated under section 7, clause v, of the Court Fees Act, i.e., as in a suit for possession of land. A second appeal having been preferred by the plaintiffs in this Court, the stamp officer is of opinion that the plaintiffs should pay court fees not only under section 7, clause v, but also under section 7, clause x. This is contested by the plaintiffs appellants. As stated by a Bench of this Court in *Muhi-ud-din Ahmad Khan* v. *Majlis Rai* (1), the

(1) (1884) I. L. R., 6 All., 231.

1916

NIHAL SINGH v. SEWA RAM

suit is in substance one for specific performance of a contract and falls *primâ facie* under section 7, clause x, of the Court Fees Act. I have no hesitation in accepting this as the true solution of the case, for one simple reason, viz., when a vendor contracts to sell, he contracts, as laid down in section 55 of the Transfer of Property Act, to execute a proper conveyance of the property to the buyer, and tender it to him for execution at a proper time and place on payment of the amount due in respect of the price. He also contracts to give to the buyer or such person as he directs such possession of the property as its nature admits. The plaintiffs in the present case are clearly seeking to enforce the contract of sale and they also seek to force the vendor to do that which he is bound to do under that contract, i.e., to execute and register a sale-deed and to hand over possession of the property. The subsequent transferee is also made a party under the terms of section 27 of the Specific Relief Act and the two reliefs can be enforced as against him by the plaintiffs. The suit, in my opinion, is in substance and in form a suit for specific performance of a contract, and the court fees must be paid in accordance with clause x of section 7 of the Court Fees Act.

In the present case the court fees calculated under that section amount to Rs. 170. The court fee already paid is Rs. 26-4. The memorandum of appeal in this Court is therefore deficient by the difference between the two sums. There is also an equal deficiency due from the same plaintiffs for each of the courts below. They will therefore have to make good the deficiency for all three courts. I allow six weeks within which to make good the deficiency for all the courts.

APPELLATE CIVIL.

1916
February, 15.

Before Mr. Justice Piggott and Mr. Justice Walsh.

NIHAL SINGH AND ANOTHER (DEFENDANTS) v. KHUSHIAL SINGH (PLAINTIFF) AND GIRDHARI SINGH AND ANOTHER (DEFENDANTS)*

Civil Procedure Code (1908), *schedule II, paragraph 21; order XLIII, rule 1—Arbitration—Application to file award made out of court—Application granted ex parte—Refusal to set aside ex parte order—Appeal.*

Held that an appeal will lie against an order rejecting an application to set aside an *ex parte* decree passed under paragraph 21 of the second schedule to the Civil Procedure Code, 1908.

THE facts of this case were as follows:—

The respondent applied in the court of the Subordinate Judge of Mainpuri under paragraph 21 of the second schedule to the Code of Civil Procedure, asking the court to file an award in a matter which had been submitted to arbitration without the intervention of the court.

Objection was taken by the opposite party to the filing of the said award and then there was a further agreement to refer to arbitration the question whether the award ought to be filed or not. The arbitrator thus appointed came to a decision that the award ought to be filed. One of the parties, namely, the appellants before this Court, objected to this award and presented a petition in court putting forward certain grounds why this award, or the decision of the arbitrator appointed in the case itself, should be set aside. After some delay the 24th of July, 1915, was fixed for disposal of these objections. On that date the objectors were late in appearing and their objection was dismissed *ex parte*. Thereupon judgement was pronounced in accordance with the award and a decree followed, that is to say, in this particular case a decree followed filing the award in the arbitration conducted without the intervention of the court. On their arrival later in the day, that is to say, on the 24th of July, 1915, the present appellants presented to the court below an application under order IX, rule 13, of the Code of Civil Procedure asking the court to set aside its *ex parte* order and the decree passed in accordance therewith, to readmit their petition of objection and to decide the same on the merits. The court

* First Appeal No. 187 of 1915, from an order of Pandit Lal Behari, Subordinate Judge of Mainpuri, dated the 4th of September, 1915.

1916

NIHAL SINGH v. KIRPHAL SINGH.

below examined the petitioners, Nihal Singh and Kirpal Singh, on their application and relying upon certain contradictions in their evidence, came to the conclusion that they were not speaking the truth. The learned Subordinate Judge accordingly held that these persons had failed to show that they had been prevented by any sufficient cause from appearing in time on the 24th of July, 1915, when their case was called on for hearing. He therefore dismissed their application. Against this order of dismissal the objectors filed the present appeal. A preliminary objection was taken that no appeal lies.

Munshi *Benode Behari*, for the appellants.

Munshi *Baleshwari Prasad*, for the respondents.

PIGGOTT, J.—This appeal arises out of proceedings in the court of the Subordinate Judge of Mainpuri which commenced with an application under paragraph 21 of the second schedule of the Code of Civil Procedure, asking the court to file an award in a matter which had been submitted to arbitration without the intervention of the court. Objection was taken by the opposite party to the filing of the said award and then there was a further agreement to refer to arbitration the question whether the award ought to be filed or not. The arbitrator thus appointed came to a decision that the award ought to be filed. One of the parties, namely, the appellants now before us, objected to this award and presented a petition in court putting forward certain grounds why this award, or the decision of the arbitrator appointed in the case itself, should be set aside. After some delay the 24th of July, 1915, was fixed for disposal of these objections. On that date the objectors failed to appear and their objection was dismissed *ex parte*. Thereupon judgement was pronounced in accordance with the award, and a decree followed, that is to say, in this particular case a decree followed filing the award in the arbitration conducted without the intervention of the court. On the same day, that is to say, on the 24th of July, 1915, the present appellants presented to the court below an application under order IX, rule 13, of the Code of Civil Procedure, asking the court to set aside its *ex parte* order and the decree passed in accordance therewith, to re-admit their petition of objection and to decide the same on the merits. The court below examined the petitioners,

1916

NIHAL SINGH v. KHUSHAL SINGH.

Nihal Singh and Kirpal Singh, on their application and, relying upon certain contradictions in their evidence, came to the conclusion that they were not speaking the truth. The learned Subordinate Judge accordingly held that these persons had failed to show that they had been prevented by any sufficient cause from appearing before him on 24th of July, 1915, when their case was called on for hearing. He therefore dismissed their application. Against this order of dismissal the present appeal has been filed. A preliminary objection is taken that no appeal lies.

Under order XLIII, rule 1, clause (*d*), of the Code of Civil Procedure an appeal lies against an order rejecting an application for an order to set aside a decree passed *ex parte* in a case open to appeal. What we have to determine is whether the case now before us was one open to appeal. It is contended by the other side that the decree pronounced under paragraph 21 of the second schedule to the Code of Civil Procedure was not a decree against which an appeal lay, unless it were alleged that it was in excess of or not in accordance with the award. It is, therefore, contended that in the absence of any such allegation no appeal lay in the present case and the order refusing to set aside the *ex parte* decree is itself unappealable. To this I think the answer is two-fold. The words in order XLIII, rule 1, clause (*d*), are perfectly general; they are "in a case open to appeal." Now the case between the parties in the court below was whether or not an award made without the intervention of the court should be filed as a decree of the court. In that case an appeal lay under section 104, sub-section (1) (*f*), from any order which a court might pass, filing or refusing to file the award. It was therefore a case open to appeal. Moreover, an appeal might lie from the decree itself on certain grounds, and to this extent the decree itself was open to appeal. The fact that no appeal has been brought from the decree is irrelevant, because the question before us is merely whether the decree was open to appeal. Nor is it relevant to ask us to consider whether the decree is or is not in fact in accordance with the award, because that only amounts to arguing that any appeal brought against the decree would be bound to fail. The question for determination is not whether an appeal could have been successfully prosecuted against the

1916

NIHAL SINGH v. KIRPAL SINGH.

decree, but whether it was "open to appeal." It seems obvious that it was

We now have to consider the appeal on the merits, that is to say, we have to reconsider the question determined in the court below, namely, whether the appellants had or had not shown that they were prevented by any sufficient cause from appearing when the suit was called on for hearing. According to their own sworn statement before the court they started from home at such an hour as to give them a reasonable expectation of being present in court before the case was called on. They reached the court as a matter of fact some two or three hours late, and the reason for this was that they were delayed on the journey by heavy rainfall. The learned Subordinate Judge has relied upon certain discrepancies between the statement of Nihal Singh and that of Kirpal Singh. These discrepancies all seem to be upon incidental matters, not vital to the question for disposal. They may have been due to failure of memory on the part of the deponents, who were examined some weeks after the events to which they were deposing, or may have been due to one or the other trying to prove too much, as for instance, one of them stated that he left the village on horseback when as a matter of fact he was content to perform the first few miles of the journey on foot. What the learned Subordinate Judge has entirely overlooked is the amount of corroboration which these depositions receive from the record itself. We find that these appellants had summoned witnesses to attend on the 24th of July, 1915, that they had paid process fees and that summons had been issued and had been duly served on the 22nd July on the witnesses concerned. Under the circumstances it seems to me impuning to the appellants conduct on the verge of insanity if, after having made all possible arrangements for prosecuting their case, they deliberately absented themselves. There seems no real reason to doubt that they in fact left their village, thirty miles or more distant from the place of sitting of the court, on the evening of the 23rd of July, and that they did so with reasonable prospect and intention of presenting themselves before the court at the proper time. The fair conclusion to arrive at is that they were in fact prevented by the cause alleged by them, namely, by the setting in of heavy rain which

overtook them in the course of their journey. On these facts I would accept the present appeal and hold that the appellants have shown sufficient cause for their non-appearance, would set aside the order of the court below and in lieu thereof pass an order setting aside the *ex parte* decree in question and directing the court below to re-admit on to its pending file the petition of objection filed by the present appellants against the award of the arbitrator and to hear and dispose of the same according to law.

1918

NIHAL SINGH v. KHUSHAL SINGH

WALSH, J.—I concur in the order proposed by my learned brother and in the reasons given by him. I would further point out that this is only one example of several cases we have recently had before us, where a party has been shut out from a hearing, and where, whether he was rightly or wrongly shut out, the grounds given in the judgement have not been adequate. Not unnaturally a party in that position is dissatisfied and comes to this Court. It is then sought to support the judgement of the court below shutting out the party, on the ground of want of *bond fides*, or conspiracy to keep away by the party shut out. No doubt there are such cases; parties may cunningly devise to gain time, dishonestly keep away, and make dishonest applications for a re-hearing. But on a question of that kind, *viz.*, whether there was a *bond fide* accident or a fraudulent attempt to gain time, it is not less difficult to arrive at a conclusion without a careful examination of the facts, than it is in hearing any other case where there is an issue of dishonest conduct. It is desirable in such a case that the court should examine all the facts with the same care and attention that it devotes to ordinary suits, and give the grounds for its decision with some adequacy. Secondly, I would point out that this case shows that, unless that course is taken, the action of the court defeats its own ends. If this case had been really a fraudulent attempt to gain time it might, even if the court were not absolutely satisfied of that fact, have been re-heard as early as October. There would have been a loss of two months. Now owing to the short cut which the court tried to take, the appellants have gained eight months since it cannot be re-heard till March.

BY THE COURT.—The appeal is allowed, the order of the court below is set aside and in lieu thereof an order is passed setting

1916
NIHAL SINGH
v.
KHUSHAL SINGH

aside the *ex parte* decree of the court below and directing the court below to re-admit on to its pending file the petition of objections filed by the appellants against the award of the arbitrator and to hear and dispose of the same according to law. No order as to costs.

Appeal decreed and cause remanded.

FULL BENCH.

1916
February, 17

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

RAMA PRASAD (DEFENDANT) v. MANMOHAN LAL (PLAINTIFF).*

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111, 114, 233 (b)—Civil Procedure Code (1908), section 11; order II, rule 2—Partition—Suit for partition of property the subject of partition.

A person who was really entitled to one half of a four biswa zamindari share, but was recorded only in respect of a 3½ biswa share, applied for partition of the latter share. After the date fixed for filing objections the person who was recorded in respect of the remaining one-fourth biswa share came in and asked for partition of that one-fourth biswa share. The partition was completed, but subsequently the original applicant brought a suit to recover the one-fourth biswa share.

Held that the suit was not barred by section 233 (*b*) of the United Provinces Land Revenue Act (III of 1901), neither was it barred by order II, rule 2, of the Code of Civil Procedure, inasmuch as that rule did not apply to proceedings under the Land Revenue Act, nor by the rule of *res judicata*.

THE facts of this case are very fully stated in the order of TUDBALL, J., referring the appeal to a Divisional Bench, which was as follows:—

This appeal arises out of a suit for possession. It is a defendant's appeal. As the lower appellate court has only decreed the claim in part, the plaintiff has filed objections in regard to that part of its claim which has been disallowed.

The facts are slightly complicated. One Dilsukh Rai was the owner of a ten biswa share in the village now in dispute, i.e., he owned half the village, and his share has been called "a 10 *biswa asli*," i.e., an original ten biswa share, in some parts of the

* Second Appeal No. 1255 of 1914 from a decree of Brijnath Das, Subordinate Judge of Bareilly, dated the 25th of April, 1914, modifying a decree of Muhammad Zain-ul-Hasan, Munsif of Hafali, dated the 20th of November, 1913.

1916

RAMNA PRASAD v. MANMOHAN LAL.

litigation in which it has also been involved, while in other parts it has been called a "20 biswa *farzee*" share because it was subsequently partitioned off into a separate mahal of 20 biswa. Throughout this judgement it will be treated as a ten biswa *asli* share except where I use the word "*farzee*".

Dilakh Rai died leaving a widow and four sons. In place of his name, those of the widow and the four sons were recorded in Government records each as the owner of a 2 biswa share as below:—

2 Biswa	...	Musammat Jamna.
2 Biswa	...	Gauri.
2 Biswa	...	Dilwari.
2 Biswa	...	Mul Chand.
2 Biswa	...	Piyare Lal
Total 10 Biswas		

On 11th March, 1869, Mul Chand and Piyare Lal mortgaged the whole 10 biswas to Nand Kishore, the father of the present plaintiff Manmohan Lal. The mortgagee subsequently sued the widow and the three sons Gauri, Dilwari and Piyare Lal on the basis of the mortgage. The mortgagor Mul Chand had in the meantime died without leaving any issue and the ten biswas which stood in his name had been divided up among the other four, so that the khewat stood as follows:—

2½ Biswa	...	Jamna.
2½ Biswa	...	Gauri.
2½ Biswa	...	Dilwari.
2½ Biswa	...	Piyare Lal.

The mortgagee obtained a decree as against the shares of Mul Chand and Piyare Lal only, i.e., for the sale of four biswas, and he purchased this four biswas in execution of this decree on 20th of March, 1880. He applied for mutation of names and obtained it, but a curious error occurred and is really the cause of the present litigation. Nand Kishore's name was recorded as the owner of 3½ biswas instead of four biswas, the balance of 1½ biswas remaining under the name of Gauri. The khewat stood thus:—

1910

KALKA PRASAD v. MANGOHAN LAL.

2 Biswa Jamna } instead of { 2 Biswa Musammat Jamna,
2½ Biswa Gauri } { 2 Biswa Gauri.

2 Biswa Diwari } instead of { 2 Biswa Diwari,
3½ Biswa Nand Kishore } { 4 Biswa Nand Kishore.

The next fact to be noted is that the shares standing in the name of Musammat Jamna and Diwari were attached and sold in execution of a decree obtained by the United Service Bank and were purchased by one Kali Charan on the 22nd of June, 1883.

Kali Charan, however, apparently did not obtain possession and he sued for it in 1889. His suit came up to this Court where in 1894 he was held entitled only to the two biswa of Diwari.

In that same year, however, Kali Charan purchased the two biswa which had stood in Musammat Jamna's name from the two remaining sons, Gauri and Diwari. Piyare Lal had died in the meantime.

In the meantime also Gauri's original 2 biswa share had, prior to 1891, been acquired by Musammat Jani Begam. Gauri had sued to recover it but his suit was dismissed in 1891.

When therefore in 1894 Kali Charan purchased the two biswa which stood in Musammat Jamna's name, the khewat stood as follows:—

4 Biswa	..	Kali Charan.
2 Biswa	..	Jani Begam.
½ Biswa	..	Gauri.
3½ Biswa	...	Nand Kishore.

Gauri's name remained up to the year 1901. Nand Kishore was the lambardar of the mahal.

One other piece of litigation must here be mentioned.

In 1888 Nand Kishore, seeing the result of Kali Charan's suit in which it had been held that Musammat Jamna had no title to the two biswa share which stood in her name, brought a suit against Gauri and all others concerned for a declaration that, as Musammat Jamna had no share, i.e. Nand Kishore, by acquiring the shares of Mst. Chand and Piyare Lal had become the owner of five biswa share. It was finally held on appeal on the 22nd of September, 1899, as between the parties that i.e. Nand Kishore, was the owner of four biswas only. The date of this decision should be noted; also the facts that Nand Kishore was the

1916

KALKA PRASAD v. MANMOHAN LAL.

lambardar and that his name stood recorded as against only 3¾ biswas only.

In 1901 the one-fourth biswa standing in the name of Gauri was attached and sold in execution of a decree obtained against him. Gauri by one Narain Das. It was purchased by Kalka Prasad on the 20th of August, 1901. The latter obtained mutation of names on the 2nd of August, 1902. He is said to have paid off a pre-existing mortgage of Rs 150 which was on the property. The khewat then stood as follows :—

Kali Charan	...	4 Biswas
Jafri Begam	...	2 Biswas
Kalka Prasad	...	¼ Biswa.
Nand Kishore	...	3¾ Biswas.

In the year 1910 Kali Charan applied to the Revenue Court for partition of his four biswa share.

The usual notice and proclamation was issued to the other co-sharers, the date fixed being 10th of September, 1910. On the 9th of September, 1910, i.e., within the time allowed by the proclamation, Manmohan Lal, the present plaintiff-respondent, one of the two sons of Nand Kishore, who had died, applied for partition of his ½ share in the 3¾ biswas which stood in the name of himself and his brother Govind Prasad. On the 10th of September, 1910, Kalka Prasad applied for partition of his 5th biswa share, i.e., a five biswansi share.

Kalka Prasad's application was no within time. If he wished to have his share partitioned he ought to have applied before the date fixed. However, no objection was raised by anybody and the partition was carried out and Kalka Prasad was put into possession of his separate mahal by the Revenue Court. The partition came to an end on the 1st of September, 1911.

Presumably it came into force according to law from the 1st of July, 1912. Govind Prasad's ½ share in the 3¾ biswas was made into a separate mahal. There was a dispute between Manmohan Lal and Gobind Prasad and under an award, dated the 2nd of December, 1912, Gobind Prasad's share in the village was transferred to Manmohan Lal. The latter now has sued Kalka Prasad for possession of the ¼th biswa share which the latter now holds as a

1916

KALKA PRASAD v. MANMOHAN LAL.

separate mahal. The suit was instituted on the 18th of August, 1913. The court of first instance held that the plaintiff not having contested Kalka Prasad's claim in the partition case, and not having claimed as his share any more than ½ of the 3¾ biswas, his present suit was barred by the provisions of section 233, clause (*k*), of the Revenue Act and dismissed the suit *in toto*. The lower appellate court held that the claim was thus barred only in respect of one-half, that in regard to the other half the plaintiff was the successor in title of Gobind Prasad and as Gobind Prasad was not an applicant for partition and had had no legal opportunity of objecting to Kalka Prasad's application for partition his, Gobind Prasad's, claim in the Civil Court could not be barred by section 233 (*k*) of the Revenue Act and the plaintiff in respect to half of the property was the successor in title of Gobind Prasad. He therefore decreed half of the claim and dismissed one-half.

The defendant appeals in regard to one-half and the plaintiff objects as to the half of his claim disallowed and also in respect to mesne profits which the court below refused to grant.

The fourth ground of appeal is that the plaintiff and Gobind Prasad were members of a joint Hindu family and the plaintiff was the manager thereof and his application for partition of the 9th of September, 1910, was on behalf of the family and was binding on Gobind Prasad as well and therefore the whole claim is barred by section 233 (*k*) of the Revenue Act. This plea is based on the plea that the plaintiff, when he applied for partition applied for partition of the whole 3¾ biswa share owned by him and his brother. This latter point is really a question of fact, and it was found against the appellant in the court below. It was rightly held against him.

The ten biswa original share, i.e., *asli* share, has by a previous partition become a mahal in itself, mahal zangari, and was a 20 biswa mahal. Manmohan Lal applied for partition of 3¾ biswas out of the 20 biswas of mahal zangari, i.e., one-half of the original 3¾ biswas out of the original 10 biswas. His petition clearly shows this, as he states that the area of his share would be 49 bighas, 2 biswas, 8 biswansis, out of a total area of 262 bighas odd which made up mahal zangari.

1916

KALKA PRASAD v. MANMOHAN LAL.

It is clear, therefore, that the plaintiff applied only for partition of his own share in the mahal and that no action on his part in so doing would have any binding effect on Gobind Prasad.

The fourth ground of appeal is thus of no force.

The third ground of appeal has not been pressed. There are thus left the first two only.

(1) Because the whole suit is barred by section 233 (*k*), Act III of 1901.

(2) Because the suit is barred by the principle of *res judicata*.

The objections are:—

(1) that the plaintiff's claim as to his own personal half share is not barred by section 233 (*k*), Act III of 1901;

(2) that the plaintiff is entitled to his mesne profits.

Here I must note that one point was raised in the argument before me which was not raised in either of the courts below nor even in the grounds of appeal to this Court.

It is urged that Kalka Prasad, having paid off a prior mortgage of Rs. 150, is entitled to retain the property until that sum is repaid to him.

Now the fact that this mortgage ever existed or that it was redeemed by Kalka Prasad was not put forward in the written statement, nor was any issue raised upon it, or decided. The only trace of this mortgage on the record is to be found in the judgement of the first court where there is a mention of it.

Kalka Prasad filed objections as a respondent in the court below, but even in that court he did not put forward this plea. In his decision on the 5th issue the court of first instance says:—"It is proved that the defendant after purchasing the property in question redeemed a mortgage which stood against it by payment of a sum of Rs. 150."

The fifth issue was in regard to the suit being barred by section 115, Evidence Act, and section 41, Transfer of Property Act, and had no concern with the payment of this mortgage. The point was not taken in the court below and there is therefore no finding as to the actual facts by that court. In my opinion it is too late to raise it here in second appeal. I, however, do not propose to decide this appeal. It seems to me that the questions of law involved are of considerable importance and should be decided by

1916

KALKA PRASAD v. MANMOHAN LAL.

a larger Bench. I therefore refer this appeal to a Bench of two Judges for decision.

Mr. *Nihal Chand* and Munshi *Iswar Saran*, for the appellant.

The Hon'ble Munshi *Gokul Prasad*, for the respondent.

RICHARDS, C. J.—The facts connected with this appeal are very fully stated in the order of my learned colleague who referred the case. The suit is one to recover possession of certain property which originally was a quarter biswa asli share which has now been by partition formed into a separate mahal. It appears that in the year 1910 one Kali Charan made an application in the Revenue Court for partition of his four biswa share. A 3¾ biswa stood in the names of the plaintiff and his brother, who are the sons of one Nand Kishore. One Kalka Prasad, the present defendant, was also recorded in respect of one-fourth biswa. This is the one-fourth biswa that is now in dispute. On the day after the date fixed for the hearing of objections this Kalka Prasad made an application for the partition of the one fourth biswa which stood in his name. He made this application in the same proceeding as the proceeding of Kali Charan. The result was that the partition was held and a mahal of half of the 3¾ biswas was made in favour of the plaintiff. Kalka Prasad had a mahal formed of the one-fourth biswa which stood in his name and Kali Charan had a mahal formed of the four biswa share. The plaintiff has now instituted the present suit to recover possession of the mahal allotted to Kalka Prasad. He was met with various objections. The lower appellate court decided in favour of the plaintiff as to half, and in favour of the defendant as to the other half. It held that the plaintiff having regard to what previously occurred was not entitled to the share, the half which he claimed in his own right, but the half which he claimed by succession to his brother the court has held him entitled to. The defendant has appealed and the plaintiff has filed a cross-objection.

Three questions of law have been raised for our decision; firstly it is said that having regard to the partition the suit is barred by the provisions of section 233 (*b*) of the Land Revenue Act. The second point is that the plaintiff not having included in his

application for partition all the shares to which he was entitled cannot now claim what he omitted. The third ground is that the claim is barred by the rule of *res judicata*. With regard to the first point, section 263 of the Land Revenue Act provides that no person shall institute any suit or other proceeding in the Civil Court "with respect to partition or union of mahals" except as provided in sections 111 and 112. I find it impossible to hold that the present suit is a suit "in respect of partition or union of mahals" and I have given my reasons for so holding in the judgment this day delivered in Letters Patent Appeal No. 94 of 1915. With regard to the second point I see no reason why a person entitled to more than one share in a mahal is necessarily bound to include in his application for partition all that he is entitled to. No doubt the revenue authorities might, under certain circumstances, refuse to make partition unless the applicant was prepared to have partition of all he was entitled to. No doubt also, if a question subsequently arose as to the title of the plaintiff, an inference might be drawn against the plaintiff, (specially if there was a conflict of evidence) from the fact that when he had an opportunity of putting forward a claim to the disputed share he had not done so. But these matters are entirely outside the question which we have to decide. Order II, rule 2, of the Code of Civil Procedure provides that suits in a Civil Court should include the whole of the claim to which the plaintiff is entitled. But order II, rule 2, does not apply to proceedings in the Revenue Court under the Land Revenue Act. In my opinion the mere fact that the plaintiff did not claim all that he was entitled to at the time of partition does not necessarily bar his present claim. The only point is that of *res judicata*. The rules of *res judicata* will be found in section 11 of the Code of Civil Procedure. It only arises when the first court is competent to decide the subsequent suit. No doubt, under section 111 of the Revenue Act, under certain circumstances a Revenue Court becomes a Civil Court and its decrees are to be treated as the decrees of the Civil Court. Those circumstances are to be found in the section itself. Section 111 says:—"If, on or before the day so fixed, any objection is made by a recorded co-sharer, involving a question of proprietary title which has not

1916

KALKA PRASAD v. MANGIGAN LAL.

been already determined by a court of competent jurisdiction, the Collector may either—

(a) decline to grant the application until the question in dispute has been determined by a competent court, or

(b) require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or

(c) proceed to inquire into the merits of the objection.

Clause 3 provides:—"If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits."

Section 112 provides:—"All decrees passed under sub-section (3) of the preceding section shall be held to be decrees of a court of civil jurisdiction of the first instance." It thus appears that it is only when an objection is made by a recorded co-sharer involving a question of proprietary title which the Collector determines to decide himself that the decision of the Revenue Court can be held to operate as *res judicata*. In the present case there was no objection filed at all. Kalka Prasad filed no objection but merely put in a claim (out of time) to have the one-fourth biswa formed into a separate mahal. No question of title to this one-fourth biswa was ever raised by an objection nor could it have been raised. The court never determined to try the question nor has it in fact ever given any decision on the point. It seems to me therefore that the present suit is not barred by the rule of *res judicata*.

Some attempt has been made to contend that the defendant was entitled to set up a prior mortgage which he alleges that he paid off. In my opinion this contention is disposed of by the remarks of our learned colleague who referred the case and I entirely agree with the view he has taken.

As to the plea of section 41 of the Transfer of Property Act in my opinion this is disposed of by the lower appellate court and so far as it is a finding of fact it is binding on us in second appeal.

In my opinion the appeal should be dismissed and the objection should be allowed and the decree of the court below should

be modified by giving the plaintiff a decree as claimed except as to mesne profits.

1916

KACHA PRASAD v. MAHOMMAD IAZ

TUDBALL, J.—I agree. It seems to me that there can be no question that section 233 (*k*) and the rule of *res judicata* do not bar the present claim in any way. As regards order II, rule 2 it is clear that that portion of the Code of Civil Procedure does not apply to the courts acting under the Revenue Act. That Act lays down a procedure in chapter IX for all Revenue Courts. It does make certain portions of the Civil Procedure Code applicable to these courts, but only to a very small extent, and certainly it does not apply order II, rule 2. As far as I can see there is nothing in the Revenue Act which will prevent a man from applying in the Revenue Court for the partition of a portion of his share in the mahal and to have that portion separated into a distinct mahal. Under these circumstances it is impossible to apply the principles of order II, rule 2, in partition cases in the Revenue Court. With regard to the plea raised under section 41 of the Transfer of Property Act this is completely settled by the judgement of the court below. All the circumstances of the case negative the plea that there was any consent either express or implied.

In my opinion the appeal should be dismissed. The cross-objection should be allowed so far as the claim for possession of the plaintiff's half share is concerned and also as to costs. I would disallow the claim for mesne profits.

MUHAMMAD RAFIQ, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal will be dismissed, the cross-objection will be allowed save in respect of mesne profits. The plaintiff's claim shall stand decreed except as to mesne profits with costs in all courts.

Appeal dismissed. Cross-objection partly allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR *v.* BHIMA AND ANOTHER.*

1916

Criminal Procedure Code, section 233—Procedure—Joint trial—Theft and receive: trial to cycle.

Feb. 29th.

Held that, in the absence of evidence clearly disconnecting the act of receiving the stolen property from the theft thereof, the theft and the receipt of the

*Criminal Reference No. 92 of 1916.

1916

EMPEROR v. BHIMA.

stolen property may be considered as parts of the same transaction. It would not, therefore, be illegal to try the thief and the receiver jointly. *Emperor v. Balabhai Hargovind* (1) followed

THE facts of this case were as follows :—

A theft was committed on the 26th of September, 1915, in the house of one Nazir Jan. Some weeks later a Sub-Inspector, whilst investigating another case, found in the house of one Bhima part of the property which had been stolen from Nazir Jan Further, in consequence of something said to him by Bhima the Sub-Inspector searched the house of one Dwarka, and in that house discovered more of the property stolen in the robbery at Nazir Jan's On the 26th of September, Bhima and Dwarka were tried jointly and convicted They applied in revision to the Sessions Judge, who, being doubtful whether the joint trial did not amount to an illegality, referred the case to the High Court.

Neither the accused nor the Crown were represented.

KNOX, J.—Bhima and Dwarka have been convicted under section 411 of the Indian Penal Code, They were tried together. They applied in revision to the court of Session at Cawnpore and took sundry objections to the conviction. These objections have been found to have no weight by the learned Sessions Judge, but he says that at the very last the learned pleader who appeared in support of the application raised the objection that the two convicts should not have been tried together This objection was based on section 239 of the Code of Criminal Procedure. The learned Sessions Judge considering this objection a good objection has referred the case to this Court. It would appear that on the 26th of September the house of one Nazir Jan was broken into and property stolen therefrom The police failed to trace the thieves, but later on, somewhere in the month of October, a Sub-Inspector, who was inquiring into another case in which Bhima was suspected, found on the premises occupied by Bhima, who tried to hustle him away, property which had been stolen from Musammat Nazir Jan. Bhima on being further pressed dug out a steel trunk and handed it over to the Sub-Inspector. In consequence of something which the Sub-Inspector learnt from Bhima he went on to search the houses occupied by Dwarka and Rukna. In Dwarka's house other property was found and

(1) (1904) 6 Bom. L. R., 517.

1916

EMPEROR v. BHIMA.

another steel trunk. The property thus found and the steel trunk had been identified by Nazir Jan as property either of her own or of her sister since deceased, Nawab Jan. Both were identified as property stolen from the house, broken into in the month of September. Both Bhima and Dwarka deny that this property was found in the houses respectively occupied by them. The case then against the two accused amounts to this: Musammat Nazir Jan's house was broken into at the end of September, stolen property is found in October, partly in the house of Bhima and partly in the house of Dwarka. Can the reception of the property with guilty knowledge of Bhima and Dwarka be considered to be part of the same transaction, viz., burglary in the house in September? The Calcutta High Court appear to hold in a somewhat similar case that the theft and the reception of the stolen property with guilty knowledge could not be regarded as forming part of the same transaction. This was held in *Abdul Majid* v. *Emperor* (1). The case was heard by three Judges. One of the Judges, Mr. Justice BRETT, dissented and held that there was no reason why the theft of the property and receipt of the stolen property in that case should not be considered to form part of the same transaction. On the other hand he held there were good reasons to consider that thefts are generally committed not so much for the property as for what the property can be sold for, and persons concerned in the theft as well as those engaged in the purchase or dishonest receipt of the property are all engaged at different stages in what amounts to the same transaction. In that case as in this no evidence was offered to prove that the dishonest receipt of the different articles found in the possession of the different accused had been taken at different times. Mr. Justice BRETT referred to a case in which the Calcutta High Court had in 1880 held that the thief and the receiver of property stolen at that theft might be tried together under the provisions of section 239 of the Code of Criminal Procedure. This, he added, had been the common practice in the courts in the presidency of Bengal both before and after the decision in *Re A. Daud* (2).

This question has been considered by the Bombay High Court in *Emperor* v. *Balabhai Hargovind* (3). Two learned Judges

(1) (1901) I. L. R., 28 Calc., 485. (2) (1880) 5 C. L. R., p. 374.
(3) (1904) 6 Bom. L. R., 547.

1916

EMPEROR v. BHIMA.

of the Bombay High Court held that the guilty receipt of the property stolen was a continuation of the act of theft or criminal breach of trust. They also pointed out that the practice generally speaking in the Bombay Presidency had been to try the person committing the theft or criminal breach of trust and the receiver of stolen property jointly where it was practicable and had never been questioned until the present case in 1904. In 1905 the same question came again before the Bombay High Court. It was argued before two learned Judges who differed and the case then went to a third Judge. RUSSELL and BATTY, JJ., held that the trial of the three accused in that case together was in contravention of the provision of section 239 of the Code of Criminal Procedure and therefore illegal. Mr. Justice AYLOX held that the charges could be tried together, and cited another case of the Bombay High Court, *Emperor* v. *Keshav Krishna* (1). That case, however, differs from the case before me; there were several receivers of the stolen property and Mr. Justice BATTY evidently leans to the view that the acts of dishonest receipt had been on totally different occasions; he cited *Emperor* v. *Balabhai Hargovand* (2) without any disapproval and distinguished it from *Jetha Lal*. The question does not seem to have been raised in this Court up to the present, but so far as my experience goes the practice in this province has been the same as that which prevails in Bombay viz., that where practicable the thief and the person who receives stolen property are tried together and such trial has not been held to be in contravention of the provisions of section 239. I need not add that if the evidence showed that the act of guilty receipt was separated by a clean cut, so to speak, from the act of theft, such an exception might be taken with success. But, where a thief has taken the property stolen to a receiver or receivers, I agree with Mr. Justice CHANDAVARKAR that the difference affects only the mode of proof, and the act of receipt has, unless shown otherwise, a necessary connection with the theft. For these reasons I find no force in the objection taken by the learned Sessions Judge of Cawnpore and I direct that the record be returned.

(1) (1904) 6 Bom. L. R. 361. (2) (1904) 6 Bom. L. R. 517.

APPELLATE CIVIL.

1916
February, 25

Before Mr. Justice Piggott and Mr. Justice Walsh.

BAIJNATH RAI (DEFENDANT) *v.* DHARAM DEO TIWARI AND ANOTHER (PLAINTIFFS) AND RAJ NARAIN TIWARI (DEFENDANT).*

Guardian ad litem—Joint Hindu family—Suit on mortgage against father and sons—Irregular appointment of father as guardian of minor sons—Ex parte decree—Suit by sons to recover their shares.

In a suit for sale on a mortgage executed by the father of a joint family governed by the *Mitakshara* the plaintiffs impleaded as defendants the father and his three sons, two of whom were minors. The plaintiffs named the father as guardian *ad litem* of the minors, but no steps were taken, as required by the rules of the High Court, to ascertain whether the father was willing to act as guardian. The father did not appear, and an *ex parte* decree was passed in execution whereof the family property was sold. Subsequently, on attaining majority, the minor sons brought a suit for possession of their shares, alleged that the original debt was an immoral debt which they were not bound to discharge, and also that they had not been legally represented in the previous suit.

The court of first instance having dismissed the suit without going into the merits, the lower appellate court made an order of remand.

Held that there had been a serious irregularity in nothing worse than the appointment of the father as guardian *ad litem*, and as it was impossible to tell, without knowing to what extent the plaintiffs were in a position to establish their case regarding the immorality of the debt, how far the appointment of their father as guardian had prejudiced them, the order of remand was right.

THE facts of the case were as follows:—

Bhondu Tiwari and his three brothers executed a mortgage in 1886. The mortgagees brought a suit thereon on the 30th of July, 1896, and impleaded, besides the executants, three sons of Bhondu Tiwari. Two of these sons were minors and an application was made by the plaintiffs, supported by an affidavit, for the appointment of Bhondu Tiwari as guardian *ad litem* of his minor sons. Notice was thereupon issued to him respecting the proposed appointment and was duly served. He signified neither willingness nor unwillingness to act as guardian. On the 30th of August, 1896, the court passed an order appointing him as guardian. He did not put in any appearance whatsoever and the suit was decreed *ex parte* on the 3rd of September, 1896. It appeared that sometime afterwards Bhondu Tiwari applied on his own behalf as well as on that of the minor sons to have the *ex parte* decree

* First Appeal No. 166 of 1915, from an order of Munshi Prasad, District Judge of Ghazipur, dated the 18th of August, 1915.

1916

BAIJNATH RAI v. DHARAM DEO TIWARI

set aside, but the application was dismissed for want of sufficient prosecution.

The decree was put in execution by an assignee thereof and the mortgaged property was sold by auction and purchased by him on the 22nd of September, 1903. Bhondu Tiwari died in 1905. On the 23rd of January, 1915, the two minor sons, having now attained majority, brought a suit for recovery of possession of their share in the property sold by auction, and for mesne profits, on the allegations that the mortgage of 1886 was not executed by Bhondu Tiwari; that it was without consideration; that if it was executed for consideration then the debt was an immoral one, without benefit to the family; that Bhondu Tiwari was a man of bad character, that he did not look after his sons; that having an interest adverse to his minor sons he was not a proper person to be appointed their guardian *ad litem*, and that therefore they had not been properly represented in the previous suit. It was also alleged that Bhondu Tiwari had colluded with the plaintiffs in the suit and suffered a decree to be passed *ex parte*. For these reasons it was asserted that the auction sale was invalid *qua* the plaintiffs' shares. Various issues were struck one of them being whether Bhondu Tiwari had been rightly appointed guardian *ad litem* in the former suit. The court of first instance found it in the affirmative on the grounds that the requirements of section 456 of the Code of Civil Procedure of 1882, had been complied with, that the willingness of Bhondu Tiwari to act as guardian could be inferred from his conduct in applying on behalf of his minor sons to have the *ex parte* decree set aside, and that if his interest had been really adverse he could not have failed to point it out and get another guardian appointed. The court held, accordingly, that the suit was barred by section 11 of the Code of Civil Procedure and dismissed it without trying any of the other issues. On appeal the District Judge held that previous to appointing Bhondu Tiwari as guardian the court was bound, under a High Court Rule then in force, to definitely ascertain whether he was willing to act as guardian, and that such willingness could not be inferred from the subsequent act of applying to have the *ex parte* decree set aside. He referred to the allegations in the plaint and held that the minors had not been properly

1916

BALNATH RAI v. DEBIAN DEO TIWARI

represented, and that if those allegations were correct, they had been very much prejudiced. He reversed the order of the court of first instance and remanded the case for trial on the merits. The principal defendant, the auction purchaser appealed.

Mr. *M. L. Agarwala*, for the appellant :—

The District Judge has decided that because Bhondu Tiwari had not given his express assent to act as guardian *ad litem* in the former suit his appointment as guardian was altogether illegal and as a consequence the whole of the proceedings of that suit was null so far as the present plaintiffs were concerned. The omission to ascertain and record his express assent was a purely formal defect and not a substantial illegality fatal to the validity of the proceedings. In a case where the court had failed to appoint any person at all as guardian *ad litem*, the irregularity was much greater than in the present case. It was held by the Privy Council that the defect was one which came under section 578 of the old Code and was not fatal to the proceedings; *Wahan* v. *Banke Behari Pershad Singh* (1). The requirements of section 456 of the old Code having been complied with, and the court having once passed an order appointing Bhondu Tiwari as guardian *ad litem*, there is an absolute presumption that the court had satisfied itself on the materials before it that he was a fit and proper person to be so appointed and that he had no interest adverse to that of the minors. Throughout the course of the proceedings in the former suit there was nothing to indicate that he was not such a person or that he had any adverse interest. No exception was taken to the appointment either by Bhondu Tiwari himself or by his adult son who was a defendant in that suit and whose interest, at all events, would be identical with that of his minor brothers.

When a guardian *ad litem* has been appointed of a minor defendant in a suit, unless the minor shows that the guardian acted fraudulently and in collusion with the plaintiffs, the minor is bound by the decree passed in that suit; *Chandar Sekhar Tewari* v. *Balakdhar Dube* (2), *Daulat Singh* v. *Raghubir Singh* (3). And this is so even where the guardian does

(1) (1903) I. L. R., 30 Calc., 1021. (2) (1912) 16 A. L. J., 149.

(3) Weekly Notes, p. 1904, 141.

1916

BALDEOJI RAI v. BHAGAT DEO TIWARI

not defend the suit and the decree is passed *ex parte*; *The Collector of Moorad* v. *Cowan Singh* (1). None of the several issues framed in the present case raises the question of fraud or collusion on the part of the guardian; fraud has neither been found nor remains to be found after the remand which has been ordered by the lower appellate court. In the absence of fraud the former decree is binding on the minors. If only, then, there had been the formal assent of Bhondu Tiwari to act as guardian there could be no question that, fraud not having been found, the decree in the former suit was binding on the present plaintiffs. It is not open to them, after this length of time, to ask to have the whole proceedings set aside by reason of a merely formal defect. Bhondu Tiwari never repudiated the guardianship, on the other hand, ever since the decree of 1895, he has been fighting on his own as well as on behalf of his sons, in the execution, mutation and other proceedings. If there had been any valid defence open to the sons of Bhondu Tiwari, in the mortgage suit it would certainly have been put forward by the adult son who was a party as defendant, and in that case he would have taken care to get himself or some person other than the father appointed guardian *ad litem* of his minor brothers. This elder brother has been impleaded has a *pro forma* defendant in the present suit and it is not even alleged that he, too colluded with the plaintiffs in the former suit.

The Hon'ble *Dr. Tej Bahadur Sapru*, (with him *Pandit Uma Shankar Bajpai*), for the respondents, was not called upon to reply.

PIGOTT J.—This is an appeal by the principal defendant in a suit against an order passed by the District Judge of Cawnpur under the provisions of order XLI, rule 23, of the Code of Civil Procedure. It arises out of the following facts and circumstances. In the year 1886 one Bhondu joined with his brother in the execution of a mortgage-deed hypothecating certain immovable property. Bhondu was the head and manager of a joint Hindu family consisting of himself and his sons. In the year 1895 a suit was brought on this mortgage in which, not only the original mortgagors were impleaded, but also the three sons of Bhondu,

(1) (1916) 13 A. L. J., 497.

1916

BALDEO RAI v. DHARAM DAS PANDE

Of these three sons, one, Raj Narain, was major at the time, while the other two were minors. On the 29th of July, 1898, an application was made to the court to appoint Bhondu guardian *ad litem* for his two minor sons. Notice was issued to Bhondu, but no reply was received from him, nor did he put in any appearance in the suit. The court, however, on the 29th of August, 1898, passed an order formally appointing Bhondu guardian *ad litem* for his two minor sons, and on the 9th of September, 1898, decreed the suit *ex parte* so far as Bhondu and his sons were concerned. Eventually the property covered by the decree was brought to sale on the 22nd of September, 1903, and was purchased by the successor in interest of the original decree-holder. The present suit is brought by the two sons of Bhondu, who were minors during the litigation of 1898 and have now attained their majority. They impleaded as defendant No 1 the successor in interest of the original decree-holder, who is also in possession as auction purchaser of the property in question. They also impleaded their elder brother Raj Narain. It may be remarked that Bhondu himself has died in the interval. The plaintiffs claim to recover possession of their own shares in the property sold under the decree of the 9th of September, 1898, upon a finding that the decree itself and the auction sale which followed thereon are not binding on them. The suit was resisted only by the first defendant, and on the pleas taken by him a number of issues were framed. The learned Subordinate Judge, however, decided only two of these issues, the first and the fourth. The question covered by these issues was whether the present suit was or was not barred by the principle of *res judicata* as laid down in section 11 of the Code of Civil Procedure, along with the connected question whether the minor defendants in the suit of 1898 had been legally and effectively represented by Bhondu as their guardian *ad litem* so as to make the proceedings in that suit binding upon them. The learned Subordinate Judge found on these issues in favour of the contesting defendant, and accordingly dismissed the suit without going into the merits of the plaintiffs' case. On appeal the learned District Judge has reversed the findings of the first court on these points and has remanded the case for trial on the merits. The first defendant appeals to this Court against this order of

1910

BALWANT RAI v. DHARAM DEO TIWARI

remand. The learned District Judge has pointed out that, at the time of the litigation of 1895, there was in force a rule of this Court (Rule 128) passed under the authority conferred on this Court by section 552 of the former Code of Civil Procedure (Act XIV of 1882), according to which the consent of Bhondu should have been first obtained before he was appointed guardian *ad litem* for his minor sons. The record shows that this rule was overlooked and was in fact contravened by the court which tried the suit of 1898. Notice was issued to Bhondu, but when he failed to put in an appearance his consent would seem to have been presumed from the fact of his having made no objection, and he was thereupon appointed in his absence. It has already been pointed out that he made no defence to the suit which was in fact decreed *ex parte* ten days after the order appointing Bhondu guardian *ad litem*. It is contended before us in appeal that the District Judge should not have dealt with the matter as if the mere fact of Bhondu's appointment being in contravention of Rule 128 aforesaid was decisive of the whole question. Reading the judgement of the lower appellate court as a whole, it would not seem that the learned District Judge was himself of this opinion. He says that the question whether the minor defendants in the suit of 1898 were or were not prejudiced by the appointment of Bhondu is a question which still remains to be tried. Nevertheless it might perhaps be contended that the effect of his order, as it stands, is to determine once for all in favour of the present plaintiffs the fact that they are not bound by the decree of the 9th of September, 1898, and this is substantially the point taken before us. We have been referred to a good deal of case law on the subject; probably the case most of all in point is that of *Watkins v. Banke Behari Pershad Singh*. (1) It would seem that in that case there had been a serious irregularity in the proceedings of the court, in that no formal order appointing a guardian *ad litem* for certain minor defendants had been passed at all. There, however, the court had an advantage which has been denied to us to-day by the course which the present proceedings took in the court of first instance, namely, the advantage of having before it complete findings on all the questions of fact

(1) (1905) I. L. R., 33 Calc., 1031.

1916

BAIJNATH RAI v. DULARAM DEY TEWARI.

involved. It was therefore in a position to hold that the minors had been effectively and adequately represented in the course of the proceedings which it was sought to challenge. Upon this it was held that the defect pointed out amounted to no more than an irregularity and was not sufficient reason for holding that the proceedings were null and void as against the minor defendants and the decree not binding upon them. We have been referred to other cases, such as *Chandra Shekhar Tewari* v. *Balak Bhari Dube* (1), *The Collector of Meerut* v. *Umrao Singh* (2) and *Daulat Singh* v *Raghubir Singh* (3). All of these cases are distinguishable from the present on one broad ground, namely, that the guardian *ad litem* had in each case been duly appointed for the minor litigant or litigants concerned and the person so appointed was the proper person to act as guardian. In the case now before us there was, to put it at the lowest, a serious irregularity about the appointment of Bhondu to act as guardian for his minor sons, and it would seem also that, *qua* the question sought to be put in issue in the present litigation, Bhondu was not a fit and proper person to be appointed as guardian of his minor sons. The present plaintiffs are seeking to challenge the alienation of the joint family property effected by the sale of the 22nd of September, 1903, on a decree which, as against their father and their elder brother at any rate, was duly obtained according to law. They claim to challenge this alienation on the ground that the decree, as against Bhondu, either did not represent a real debt due from Bhondu at all, or arose out of a debt tainted with immorality. Now these were pleas which Bhondu himself could not have been reasonably expected to raise. It is therefore practically impossible to say whether or not the minor defendants, in the litigation of 1908, were prejudiced by the appointment of Bhondu to act as their guardian *ad litem* until we know whether a good defence on the lines above suggested was or was not open to the said defendants and could have been set up on their behalf by a properly appointed guardian, that is to say, the procedure adopted by the learned Subordinate Judge in seeking to dispose of the case before him upon what he conceived to be a preliminary

1916

BAIJNATH RAI v. DHARAM DEO TIWARI

issue of law, without going into the facts of the case, is practically an impossibility. To this extent the learned District Judge is right, namely, the suit requires to be tried out on the merits. It has to be determined whether the present plaintiffs are or are not in a position to impeach the alienation of the joint family property effected by means of the decree passed against Bhondu and Raj Narain. In order to ascertain this fact it has necessarily to be considered whether the plaintiffs would have had a good defence against the suit of 1898 on the lines suggested by these pleadings. Subject to these remarks, it seems to me that the decision of the learned District Judge—if that decision be properly understood—is not fairly open to objection. I would therefore dismiss this appeal while leaving costs of the parties here and hitherto to be costs in the suit.

WALSH, J.—I concur.

BY THE COURT.—The appeal is dismissed. Costs of the parties here and hitherto will be costs in the suit.

Appeal dismissed.

1916

February 22.

Before Mr. Justice Piggott and Mr. Justice Walsh.

DIGBIJAI SINGH (DEFENDANT) v. HIRA DEVI (PLAINTIFF).*

Act (Local) No II of 1901 (Agra Tenancy Act), section 134—Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi.

Held that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a rent was cognizable exclusively by the Court of Revenue under section 134 of the Agra Tenancy Act, 1901. *Baldeo Singh* v. *Beni Singh* (1) referred to.

THE facts of this case were as follows:—

The plaintiff and defendant were co-sharers in a certain mahal, the defendant being the lambardar. The plaintiff brought the present suit in the Civil Court alleging that the defendant had during the years in suit realized certain moneys on behalf of himself and of the plaintiff, in respect of which the latter claimed his share. The moneys in question are described as being rents of certain shops and houses, market dues and ground rents paid in connection with a market. Apart from

* First Appeal No 170 of 1915, from an order of E. C. Allen, District Judge of Moradabad, dated the 16th of August, 1915.

(1) Weekly Notes, 1899, p. 57.

1916

DIGBIJAI SINGH v. BIRA DEVI.

his defence on the merits, the defendant pleaded that these realizations had been made by him in his capacity of lambardar of the mahal, and that the only form of suit which could be brought against him would be a suit under section 164 of the Agra Tenancy Act (Local Act II of 1901). He also pleaded that a suit under the provisions of the Tenancy Act had already been brought against him as lambardar in the Revenue Court, and that of the claim now put forward, a part, namely, the portion relating to the rents of shops and houses, had been included in the claim before the Revenue Court and dismissed by that court, while the remainder of the claim had not been included in the suit brought in the Revenue Court, whereas it should have been so included. The court in which the present suit was filed upheld the defendant's contention on the point of law and held that the whole of the present suit was barred, either by the provisions of section 11 of the Code of Civil Procedure, or by those of order II, rule 2, of the same Code. In appeal the learned District Judge has reversed this finding and remanded the case for trial on the merits. The defendant appealed against the order of remand.

Mr. *B. E. O'Conor*, Mr. *Nihal Chand* and Babu *Sital Prasad Ghose*, for the appellant.

Pandit *Ramji Kant Malaviya*, for the respondent.

PIGGOTT, J.—In this case the plaintiff and the defendant are both co-sharers in a certain mahal and the defendant is the recorded lambardar of the same. The plaintiff brought the present suit in the Civil Court, alleging that the defendant had during the years in suit realized certain moneys on behalf of himself and of the plaintiff, in respect of which the latter claimed his share. The moneys in question are described as being rents of certain shops and houses, market dues and ground rents paid in connection with a market. Apart from his defence on the merits, the defendant pleaded that these realizations had been made by him in his capacity of lambardar of the mahal, and that the only form of suit which could be brought against him would be a suit under section 164 of the Agra Tenancy Act (Local Act II of 1901). He also pleaded that a suit under provisions of the Tenancy Act had already been brought against him as lambardar in the Revenue Court, and that of the claim now put forward,

1916

DIDBHAI SINGH v. HIRA DEVI.

a part, namely the portion relating to the rents of shops and houses, had been included in the claim before the Revenue Court and dismissed by that court, while the remainder of the claim had not been included in the suit brought in the Revenue Court, whereas it should have been so included. The court in which the present suit was filed upheld the defendant's contention on the point of law and held that the whole of the present suit was barred, either by the provisions of section 11 of the Code of Civil Procedure, or by those of order II, rule 2, of the same Code. In appeal the learned District Judge has reversed this finding and remanded the case for trial on the merits. The defendant appeals against the order of remand. We have been referred to one authority which certainly has some bearing on the question of law involved. It is the case of *Baldeo Singh* v. *Beni Singh*(1). The learned Munsif seems to have thought that that case was authority for his decision, but if it be attentively examined, it seems to be all the other way. The learned Chief Justice in that case came to the conclusion that the money claimed in the suit then before him was part of the income of a village derived from revenue paying land, and that consequently the lambardar who had realized it was bound to include it among the divisible profits for the benefit of other cosharers and could be made to account for the same by means of a suit in the Revenue Court. The learned Judge who concurred in the decision laid it down that the word "profits" should be understood to mean all income which the lambardar of a mahal realizes by virtue of his position as such, save and except the income derived from lands occupied by dwelling-houses and manufactories or appurtenant thereto. The income in question in the present case would seem clearly to be income derived from land occupied by dwelling-houses or appurtenant thereto. So far as I can gather from the record it is not revenue-paying land within the sense in which that expression was used by the learned Chief Justice in the case under reference. The learned District Judge has based his decision upon a somewhat broader ground. The point seems to me to be a very arguable one if it came before us as *res integra*. I think, however, it is virtually covered by the decision to which I have

(1) Weekly Notes, 1899, p. 57.

1916

DIGPHAI SINGH v. HIRA DEVI.

referred and that this is a matter in which it is peculiarly important that the established course of decision should not be disturbed. At any rate I am not prepared to dissent from the conclusion arrived at by the learned District Judge that the present claim was not one which could have been maintained as a suit for profits in the Revenue Court under section 164 of the Tenancy Act. If this is so, then both the objections taken fail to the ground, as neither order II, rule 2, of the Code of Civil Procedure, nor section 11 of the same Code could bar the present suit. I would, therefore, dismiss the appeal with costs.

WALSH, J.—I concur.

Appeal dismissed.

APPELLATE CIVIL.

1916

February, 9

Before Sir Henry Richards, Knight, Chief Justice and Mr. Justice Muhammad Rafiq.

MAHABIR SINGH AND ANOTHER (PLAINTIFFS) v. BHAGWANTI (DEFENDANT) *

Act (Local) No. II of 1901, Agra Tenancy Act), section 22—Occupancy holding—Succession—Holding owned by a joint Hindu family.

An occupancy holding owned by a joint Hindu family does not devolve at the death of the last surviving member of the joint family on that member's widow.

THIS was a suit for a declaration that certain leases of occupancy and non-occupancy holdings, executed by Musammat Bhagwanti, widow of one Ram Prasad, were null and void on the ground that Ram Prasad was a member of a joint Hindu family with the plaintiffs and the co-parcenary body which made up the joint Hindu family of which Ram Prasad was a member constituted the "tenant," therefore no interest devolved on Musammat Bhagwanti. The principal defence was that Ram Prasad died a separated Hindu and on his death having regard to the provisions of section 22 of the Tenancy, his interest devolved on Musammat Bhagwanti and she was therefore entitled to execute the leases in question. The court of first instance decreed the suit. On appeal the District Judge modified the decree. The plaintiffs appealed to the High Court.

* Second Appeal No. 1338 of 1914, from a decree of B. J. Dalal, District Judge of Benares, dated the 26th of June, 1914, modifying a decree of Babu Bihari Lal, Subordinate Judge of Benares, dated the 27th of March, 1914.

1916

MAHADEO SINGH v. BHAGWANTI.

The Hon'ble Munshi *Gokul Prasad*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which (in effect) the plaintiffs seek to set aside a lease made by one Musammat Bhagwanti. The court of first instance decreed the plaintiffs' claim. On appeal the learned District Judge modified the decree of the court of first instance. Musammat Bhagwanti, who made the lease, was the widow of one Ram Prasad. Ram Prasad, Mahabir and Lachman Singh, according to the finding of both the courts below, constituted a joint Hindu family, and the holdings in respect of which Musammat Bhagwanti made the lease have been found by both the courts below to be joint family property. The court of first instance considered that upon this finding the plaintiffs were entitled to the relief they sought. The learned District Judge says in the course of his judgement:—"The learned Subordinate Judge held that Ram Prasad and the plaintiffs were members of a joint Hindu family and that the two holdings were joint family holdings. On this finding he has based the conclusion that Musammat Bhagwanti had no interest in the tenancy land. I agree with the finding but not with the conclusion." The learned District Judge thought that having regard to the provisions of section 22 of the Tenancy Act, Ram Prasad had an interest which, failing male lineal descendants, devolved on his widow. In our opinion this view is not correct. Section 22 of the Tenancy Act provides that when a tenant dies his interest shall devolve in the way specified in the section. Ram Prasad was not the "tenant" of the holdings in question. The co-parcenary body which made up the joint Hindu family of which he was a member constituted the "tenant." The very moment that Ram Prasad died the co-parcenary body continued to be the tenant, but the body was composed of the survivors of the family. Ram Prasad had no "interest" which devolved upon anyone. We allow the appeal, set aside the decree of the learned District Judge and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUKTA PRASAD (DECREE-HOLDER) v. MAHADEO PRASAD AND OTHERS (JUDGEMENT-DEBTORS).*

1916
February, 22.

Civil Procedure Code (1908), section 145, order XXXIV, rule 14—Execution of decree—Security for default of judgment-debtor—Mode of enforcement of security.

On attachment of certain property under a decree by a decree-holder a third party came forward claiming the attached property as his own but subsequently entered into a compromise with the decree-holder whereby he made himself responsible for payment of the decretal amount and executed a security bond in which, in addition to undertaking a personal liability for the judgement debtor's default, he also hypothecated certain property. *Held* that default having been made by the judgement-debtor, the decree-holder was at liberty to enforce the security in the manner provided for by section 145 of the Code of Civil Procedure, and that under order XXXIV, rule 14, was not tied to his proceeding against the hypothecated property as well as any other property of the surety. *Jadu Kuar v. Shiu Pal Singh* (1) referred to.

THE facts of the case were as follows :—

One Mukta Prasad obtained a simple money decree against Manno Lal and Radha Rawan. In execution of the decree certain immovable property was attached. Thereupon Mahadeo Prasad intervened claiming the property as his. On the 15th of April, 1907, all the parties entered into a compromise, according to which Rs. 500 were paid in cash to the decree-holder and the balance was agreed to be paid by the judgement-debtors in instalments of Rs. 350 a year; and Mahadeo Prasad stood surety for the due payment of the instalments and executed a registered security bond stipulating that in default of payment by the judgement-debtors of two consecutive instalments the decree-holder would be at liberty, in execution of his decree, to recover the decretal amount from the person and property of the surety as well as from certain items of immovable property which were, for the satisfaction of the decree-holder, hypothecated in the security bond. Default in payment of the instalments for 1912, and 1913, having occurred the decree-holder called on Mahadeo Prasad to

*Second Appeal No. 15 of 1914, from a decree of Radha Charan, Additional Judge of Cawnpore, dated the 20th of August, 1913, confirming a decree of Munshi Lal, Subordinate Judge of Cawnpore, dated the 12th of August, 1913.

(1) (1915) I. L. R., 37 All., 30.

1916

MUKTA PRASAD v. MAHADEO PRASAD

make it good; he refused to do so. Thereupon the decree-holder applied in execution of his decree to bring to sale the hypothecated property aforesaid. Mahadeo Prasad objected, *inter alia*, that the decree-holder could not in execution of his decree ask for sale of the property but must institute a suit against Mahadeo Prasad for the enforcement of the hypothecation contained in the security bond. The court executing the decree gave effect to this objection and dismissed the decree-holder's application. The lower appellate court confirmed this decision. The decree-holder appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

The lower court has held that order XXXIV, rule 14, of the Code of Civil Procedure is a bar to the decree-holder's proceeding to execution of his decree to sell the property hypothecated in the security bond. But that rule requires a suit for sale to be instituted only where the mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage. Here, no such decree has been obtained; the decree which the appellant has got is not one for money in satisfaction of a claim arising under the security bond. By virtue of the stipulations in the security bond and under the provisions of section 145 of the Code of Civil Procedure, the decree-holder is entitled to seek, in execution of his decree, to sell the property of the surety; and among such property, the items of immovable property which had been hypothecated. The surety himself stipulated, in the security bond which was executed as forming a part of the compromise between the parties, that the decree-holder could, in execution of his decree, sell the hypothecated property; he cannot now be allowed to object to the decree-holder's doing so. In the case of *Janki Kuar* v. *Sarup Rani* (1) it was held that the decree-holder could in execution of his decree sell the property mortgaged in the security bond. The Calcutta High Court in some cases have taken the opposite view, but there are other cases of the same Court which are in my favour; *Shyam Sundar Lal* v. *Bajpai Jainarayan*, (2) *Baij Nath Goenka* v. *Sia Ram Das* (3).

(1) (1905) I. L. R., 17 All., 29. (2) (1903) I. L. R., 30 Calc., 1030

(3) (1913) 18 Indian Cases, 900.

Munshi *Damodhar Das*, for the respondents :—

The surety is not estopped from raising the objection on a point of law. No estoppel can arise from a mistake of law or from a wrong statement or admission on a point of law; *Gaviraya Swami* v. *Ramalakshmamma* (1) *Jagwant Singh* v. *Silan Singh* (2). Section 145 of the Code of Civil Procedure allows the decree to be executed against the surety, but only to the extent to which he has rendered himself *personally* liable. The word "personally" did not occur in section 253 of the Code of 1882; the addition of that word in the present section 145 was clearly intended by the Legislature to settle the conflict of opinion as to whether the decree-holder could proceed, in execution, against property hypothecated by the surety or was bound to institute a regular suit for enforcement of the hypothecation. "Personal liability" does not include hypothecated property and if the decree-holder chose to proceed against it he must bring a regular suit. *Tokhan Singh* v. *Girwar Singh* (3), *Mussammat Chandrabati* v *Mahadeo Prasad* (4), *Brijendra Lal Das* v. *Lakhmi Narain* (5), *Nagaruru Sambayya* v. *Tangatur Subbayya* (6). The disadvantages of allowing the decree-holder to sell the mortgaged property without a regular suit being brought for the purpose have been pointed out in the two cases reported in 19 C. W. N. The mere fact that the surety stipulated in the bond that the mortgaged property might be brought to sale without a suit would not empower it to be done. The security bond could not create a power of sale, except under the circumstances set forth in section 69 of the Transfer of Property Act. The decree-holder's application for sale of the properties in question is open to another objection, namely, that there being no decree for the sale of these properties they cannot be brought to sale without previous attachment. There is no prayer for attachment in the application of the decree-holder.

Mr. *M. L. Agarwala*, in reply :—

The surety entered into a personal covenant rendering himself and all his property liable for the satisfaction of the decretal

(1) (1894) I. L. R., 18 Mad., 53, at page 58.
(2) (1899) I. L. R., 21 All., 255.
(3) (1905) I. L. R., 32 Calc., 494.
(4) (1914) 19 C. W. N., 179.
(5) (1915) 19 C. W. N., 961.
(6) (1908) I. L. R., 31 Mad., 330.

1916

MEHTA PRASAD v. MAHADEO PRASAD

amount. The decree-holder is enforcing this personal covenant, and in doing so he has not overstepped the boundaries of section 145 of the Code of Civil Procedure. The hypothecated property need not be sold as such, but only as property of the surety.

PIGGOTT, J.—The appellant in this case held a decree against Munno Lal and Radha Rawan. He attached certain property in execution of the decree. One Mahadeo Prasad objected that the property attached belonged to him. The three parties to this controversy, the decree-holder, the judgement-debtors and Mahadeo Prasad respondent came together and arrived at a compromise. A portion of the decree was paid up at once. A promissory note was given for a further sum, and there was a covenant that the rest of the decree-holder's claim should be satisfied by annual instalments of Rs. 350. The attached property was accordingly released. Mahadeo Prasad, however, executed a security bond, making himself liable as a surety for the due performance by the judgement-debtors of that portion of the agreement which related to the payment of the stipulated annual instalments. He expressly covenanted that, in the event of default of payment in respect of any two consecutive instalments, he would himself make good the default out of his own pocket. He further covenanted that, should he fail to do this, the decree-holder might proceed in execution of the decree against his person and his property. At the same time, for further assurance of the decree-holder, Mahadeo Prasad hypothecated certain property, namely, two houses and a shop belonging to him, which were to be the security for the due performance by him of his contract of suretyship. The compromise was accepted by the court and was made the basis of an order by the execution court. There has now been default in respect of two consecutive instalments, and the surety Mahadeo Prasad has failed to make good the default as covenanted by him. The decree-holder applied to the court below to execute the decree by selling for his benefit the two houses and the shop referred to in the security bond. The application is in my opinion not very happily worded, but must nevertheless be understood as an application for attachment and sale of the houses and shop in question. It is admitted that there was no decree for

sale in existence against these houses and this shop, so that they could not be sold without previous attachment. I think it not unreasonable to regard the decree-holder's prayer for sale of these properties as equivalent to a prayer for their attachment and sale. At any rate, if the only possible objection to the granting of this application were the fact that there was no express prayer for attachment before sale, I think the decree-holder should have been allowed an opportunity of amending his application. The courts below have, however, rejected his application on grounds which go much further than the technical objection above suggested. They have held, in effect, that by reason of the operation of section 67 of the Transfer of Property Act, and of order XXXIV, rule 14, of the Code of Civil Procedure, the decree-holder cannot bring these houses to sale at all in execution of his decree, and that his only remedy is to institute a suit against Mahadeo Prasad for the enforcement of the hypothecation contained in the security bond and so obtain a decree for sale of the properties. We have been referred in the course of argument to a good deal of case-law more or less bearing on this question. I am not sure that any one case, not distinguishable from the present on some point or other of fact, has been laid before us. It seems to me, however, that on the broad question involved there has been a difference of opinion between the Allahabad and the Calcutta High Courts. The ruling of the Calcutta High Court referred to in the judgement of the lower appellate court, is that in *Lakhan Singh* v. *Gurwar Singh* (1). This case seems to have been doubted by the Full Bench of the same Court in *Baij Nath Goenka* v *Mohant Sia Ram Das* (2). On the other hand we have been referred to *Musammat Chandrabati* v. *Mahadeo Prasad* (3) and *Brajendrabal Das* v. *Lakhmi Narain* (4), in which principles substantially in accordance with the older ruling have been enforced. The Allahabad High Court in the case of *Janki Kuar* v. *Sarup Rani*, (5) took a different view, and I am not aware that the principles there laid down have ever been questioned so far as

(1) (1913) I. L. R., 32 Calc., 404. (3) (1914) 19 C. W. N., 178.
(2) (1905) 16 Indian Cases, 200. (4) (1915) 19 C. W. N., 961.
(5) (1895) I. L. R., 17 All., 99.

1916

MUKTA PRASAD v. MAHADEO PRASAD.

this Court is concerned What the learned additional Judge in the present case has really decided is that there has been a change in the law by the substitution of section 145 of the present Code of Civil Procedure for section 253 and other sections of Act XIV of 1882, by which a decree-holder proceeding against a person who has become liable as a surety for the performance of any decree or a part thereof is limited to the personal liability of the surety, as distinguished from the liability of any property which the surety might have hypothecated as security for his own due performance of his covenant. I think the general point taken with regard to the effect of the words, "to the extent to which he has rendered himself personally liable" in section 145 of the present Code of Civil Procedure, is a very arguable one; but with regard to the case immediately before us, I would be content to determine it on the ground that no question of the effect of the hypothecation, or of the liability of the mortgaged property as such, at present arises It may be that the decree-holder would have been entitled to bring a separate suit for the enforcement of the hypothecation contained in the security bond, and would have been in a stronger position if he had done so. I do not decide this point one way or the other. It seems to me, however, that the liability which it is sought to enforce by the present application for execution is a personal liability and nothing else. There is, I repeat, no decree in existence for the sale of this property, and it can only be attached and brought to sale, under the terms of the simple money decree now under execution, by reason of the liability incurred by the surety and under the provisions of section 145 of the Code of Civil Procedure. I call this enforcing the surety's liability to the extent to which he has rendered himself personally liable, and to no greater extent. It seems to me, therefore, that there is no force in the suggestion that there has been any material change in the law with regard to the particular point in controversy between the Allahabad and the Calcutta High Courts. The question is whether the provisions of order XXXIV, rule 14, prevent these particular properties from being taken in execution at all. To this question my answer would be that the said rule only applies when the mortgagee has obtained a decree for payment of money in satisfaction

1916

MURLI PRASAD v. MAHADEO PRASAD.

of a claim arising under the mortgage. In the present case the appellant has not obtained a decree against Mahadeo Prasad at all. He has obtained a decree against other persons, and Mahadeo Prasad has become liable to have his property seized in satisfaction of the decree by reason of a special covenant entered into by him, which covenant, under the provisions of section 145 of the Code of Civil Procedure, can be enforced in the execution department without any decree being obtained against Mahadeo Prasad at all. It therefore seems to me that the provisions of order XXXIV, rule 14, have no application and cannot be put forward as a bar to the present proceedings. Subject to the remarks which I have made as to the necessity for an attachment prior to sale, I would accept this appeal and send the case back through the lower appellate court to the court of first instance, with orders to re-admit the appellant's application for execution on to its pending file and to proceed with it according to law. I think the appellant is entitled to his costs in all three courts.

WALSH, J.—I agree. In my opinion this appeal can be disposed of on one simple point of construction applicable only to this case. The appeal raises no question of principle at all, but merely a question of the construction of a particular bond. As part of a compromise the respondent Mahadeo Prasad gave a bond, or a mortgage, over certain property and in that document he also entered into an express covenant that the decree-holder could realise by execution of the decree against himself personally or any property of his including the mortgaged property. I think that brought him within section 47 of the Code of Civil Procedure by means of section 145. In the judgement appealed from are these words:—"Although the property hypothecated was attached, yet there is no evidence that it belonged to the judgement-debtors. The surety is admittedly the proprietor of it and the decree-holder had no right to proceed against it." That decision was wrong. The surety had entered into an express agreement that his property including the hypothecated property might be seized in satisfaction of this decree, and I have heard nothing in the course of the argument which renders such an agreement invalid in the eye of the law. If it is not invalid, the surety who had obtained time for the judgement-debtors is bound by every

1916

MUNIA PRASAD v. MATADEO PRASAD.

obligation, legal or otherwise, to carry it out. In my opinion the application ought not to have been worded as though it were for the enforcement of the mortgage, but as though it were an application for executing the decree. The respondent has no merits of any kind, and I agree in any proposal for amendment, in order to do justice, which my brother Piggott thinks desirable.

With regard to the question that has been raised as to the meaning of section 145 of the Code of Civil Procedure, I prefer to express no opinion. In my view there is a clear distinction between a bond entered into by a surety with the Court and given to the Court as was the case in *Janki Kuar* v. *Sarup Rani* (1), and a bond, such as this, entered into between the parties. In the latter case, in the absence of some express covenant by the surety binding himself and his property as though it were property of the judgement-debtor to make it available for the satisfaction of the decree, I can see considerable difficulties in the way of enforcing the bare security which the decree-holder chooses to take, without going through the formality of a suit, and to that extent I agree with the view taken by the Calcutta High Court. I think the parties to this compromise were fully alive to these difficulties and made provision in it for the express purpose of getting rid of them.

BY THE COURT.—The appeal is allowed and the case is ordered to be sent back through the lower appellate court to the court of first instance with directions to re-admit the appellant's application for execution on to its pending file and proceed with it according to law. The appellant is entitled to his costs in all three courts.

Appeal decreed and cause remanded.

(1) (1895) I. L. R. 17 All., 99.

1916
February 26

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

HIMMAT BAHADUR AND ANOTHER (PLAINTIFFS) v. DHANPAT RAI (DEFENDANT).*

Family settlement—Claim to property to which the claimant must have known he had no title—Relinquishment to save litigation—Such relinquishment not binding on reversioners

One D E, upon the death of his wife, laid claim to certain property which had been the property of the wife's father and had been given to the wife by her mother. The mother and the surviving sister of the wife, in order to avoid litigation, relinquished a substantial portion of the property to D E.

Held on a suit by the reversioners entitled to succeed to the property upon the death of the survivor of the two ladies, that the relinquishment made by them could not properly be called a family settlement and was not valid as against the reversioners, who were minors at the time when the so-called family settlement was made. *Bihari Lal* v. *Daut Husain* (1) and *Hiraa Bibi* v. *Sohan Bibi* (2) referred to.

THE facts of this case were as follows:—

One Duli Chand died leaving two sons Munshi Nitya Nand and Munshi Bechai Lal. Munshi Nitya Nand died in the year 1878, leaving him surviving a widow Musammat Mullo and two daughters Musammat Saraswati and Musammat Naraini. Musammat Naraini was married to the defendant Dhanpat Rai. She died in the year 1889, in the life-time of her mother. Musammat Saraswati died on the 25th of November, 1902, leaving her surviving two sons who are the plaintiffs in the present suit. Musammat Mullo, after the death of her husband, executed a deed on the 15th of December, 1830, by which she gave a 2½ biswas zamindari share in this mauza to her two daughters in equal shares. It is said that she gave in a similar way other property to each of her daughters worth about two lakhs, by other deeds. On the death of Musammat Naraini in the year 1889, Musammat Mullo and her daughter attempted to get back the property which had been given to Musammat Naraini. They were opposed by the defendant Dhanpat Rai who made claim to all the property which had been in the possession of his wife. The result was that a submission to arbitration was entered into, a pleader of the name of Munshi Baldeo Prasad was called in.

*First Appeal No. 347 of 1914, from a decree of Kalyani Gopal Banerji, Subordinate Judge of Etawah, dated the 6th of August, 1914.

(1) (1913) I. L. R., 35 All., 240. (2) (1914) 18 C. W. N., 929

1916

HIMMAT BAHADUR v. DHANPAT RAI

He gave certain advice, and the end was that Dhanpat Rai executed a relinquishment of all claim to the major portion of the property, whilst Musammat Mullo and her surviving daughter admitted his claim to the property now in dispute. Subsequently the property was formed into a new mahal under the name of mahal Dhanpat Rai.

The present suit was brought by the reversioners, the sons of Musammat Saraswati to recover possession of the property of their grandfather. The defendant pleaded, *inter alia*, that the settlement arrived at after the death of Narain was a *bond fide* family settlement and binding upon the reversioners. The court of first instance accepted this defence and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Mr. *G. W. Dillon*, for the appellants.

Mr. *E. E. O'Conor* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for possession of landed property consisting of a 20 biswas zamindari share in mauza Barsua, mahal Dhanpat Rai. One Duli Chand left two sons, Munshi Nitya Nand and Munshi Bachai Lal. We are not concerned with the branch of Munshi Bachai Lal, Munshi Nitya Nand died in the year 1878, leaving him surviving a widow Musammat Mullo and two daughters Musammat Saraswati and Musammat Naraini. Musammat Naraini was married to the defendant Dhanpat Rai. She died in the year 1889, in the life-time of her mother. Musammat Saraswati died on the 25th of November, 1902, leaving her surviving two sons who are the plaintiffs in the present suit. Musammat Mullo, after the death of her husband, executed a deed on the 13th of December, 1880, by which she gave a 2½ biswas zamindari share in this mauza to her two daughters in equal shares. It is said (and probably correctly said) that she gave in a similar way other property to each of her daughters worth about two lakhs by other deeds. On the death of Musammat Naraini in the year 1889, Musammat Mullo and her daughter attempted to get back the property which had been given to Musammat Naraini. They were opposed by the defendant Dhanpat Rai who claimed

1916

HIKMAT BAHADUR v. DHANPAT RAI

all the property which had been in the possession of his wife. The result was that a submission to arbitration was entered into, a pleader of the name of Munshi Baldeo Prasad was called in. He gave certain advice, and the end was that Dhanpat Rai executed a relinquishment of all claim to the major portion of the property, whilst Musammat Mullo and her surviving daughter admitted his claim to the property now in dispute. Subsequently the property was formed into a new mahal under the name of mahal Dhanpat Rai. The plaintiffs have now instituted the present suit in which they allege that they became entitled to the property upon the death of their mother on the 25th of March, 1902, and that neither she nor their grandmother Musammat Mullo had any power to alienate the property. These allegations are met with the allegation, first, that Nitya Nand had made an oral will in favour of his wife Musammat Mullo which authorized her to dispose of the property as she pleased, secondly, that the suit was barred by limitation, and thirdly, that the arrangement on the death of Musammat Naraini was a family settlement which ought to be given effect to. As to the first point about the will; the court below has entirely disbelieved the allegation. There cannot be the least doubt that the court was right. This will was alleged for the first time in the present litigation. As to the question of limitation, false evidence was given as to the date of the death of Musammat Saraswati. We entirely agree with the finding of the court below that the lady died on the 25th of March, 1902. There only remains for consideration the question of the alleged family settlement. The learned Subordinate Judge thought that the transaction should be treated as a family settlement, and dismissed the plaintiffs' suit. No doubt their Lordships of the Privy Council and this Court have always been ready to give effect to what is in reality a "family settlement." The case of *Bihari Lal* v. *Daud Husain* (1) has been quoted, also the decision of their Lordships of the Privy Council in the case of *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (2). A careful perusal of both these cases will show that there was in each case a *bona fide* family dispute. We have to look into the facts of this case to see whether there was anything of the kind.

(1) (1913) I.L.R., 35 All., 240 (2) (1914) 18 C. W. N., 929.

1916

HUKMAT BAHADUR v. DHANPAT RAI.

Reading the deed of gift of the 15th of December, 1880, which is a specimen of the manner in which Musammat Mullo gave over the property to her daughters we think that the document, read as a whole, clearly shows that what the mother did was to accelerate the succession of her two daughters. There is, however, nothing in the document which would lead us to think that she had any intention of doing anything more. On the death of Naraini, Dhanpat Rai made claim to everything that his wife had been in possession of. It seems to us almost impossible to believe that Dhanpat Rai really considered that he had any title to this property. In his evidence in the present case he makes a feeble attempt to suggest that he thought that his wife was possessed of two classes of property, namely, some that she had got from her mother as *stridhan* and some which she had got as part of her father's estate and that this was the dispute. We have only the bare word of Dhanpat Rai for the suggestion that his wife had two classes of property, unsupported by any kind of documentary evidence. The defendant was not even born at the time of Nitya Nand's death and could know nothing personally of the property he left. Not one of the witnesses who speak of the dispute alleges that this was the dispute. It seems to us that the very highest at which the defendant's case can be put is that he in the year 1889, put forward a baseless claim, and the ladies in order to avoid being forced to litigation, consented to give him the property in suit. It is said that this settlement was carried out at the suggestion of a respectable pleader. No doubt it may have been very wise to advise the ladies to yield up property of small value sooner than have to incur the expenses and suffer the horrors of litigation, but it does not follow from that that there was a *bonâ fide* dispute, *bonâ fide* settled by the members of the family. There is a great difference between a settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it. The defendant has enjoyed the property ever since the year 1889. He has certainly got full consideration for all that he gave up on the death of his wife. There has no

doubt been some delay on the part of the plaintiffs in instituting the present suit. But it appears from certain matters on the record that they have been engaged in other litigation since the death of their mother. We think that the decision of the court below was wrong, and that it would be very dangerous to hold that the parties could evade the law by a pretended dispute and family settlement. We allow the appeal, set aside the decree of the court below, and decree the plaintiff's claim with costs in all courts.

1916

HIMMAT BAHADUR v. DHANPAT RAI.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

ABDUL KARIM (PETITIONER) v. ISLAMUN-NISSA BIBI AND OTHERS (OPPOSITE PARTIES)*.

1916

February, 28.

Act No. IX of 1908 (Indian Limitation Act), Schedule I, article 166 and 181—Civil Procedure Code (1908), section 47—Execution of decree—Limitation.—Application by judgement-debtor to be restored to possession of immovable property taken by the decree-holder in excess of that decreed.

Held that the application of a judgement-debtor for restoration of immovable property seized by the decree-holder in excess of what has been decreed, is one under section 47 of the Code of Civil Procedure, and is governed by Article 181 of schedule I to the Indian Limitation Act. *Ramam Ayyar* v. *Krishnadas Vital Dass* (1), *Har Din Singh* v. *Lachman Singh* (2), dissented from.

THE facts of this case were as follows:—

A decree, based upon an arbitration award, was passed on the 31st of March, 1911, for possession of a certain share out of several properties. In execution thereof the decree-holders obtained possession of a certain amount of property on the 19th of November, 1911. On the 18th of December, 1911, the judgement-debtor made an application in the execution court, complaining that the decree-holders had obtained possession over a larger share of the property than was awarded to them by the decree, and invoking the aid of the court under sections 151, 152 and 153 of the Code of Civil Procedure for restoration of the excess share. The court was of opinion that these sections were

* Second Appeal No. 1047 of 1914, from a decree of G. C. Radhwar, Additional Judge of Saharanpur, dated the 25th of April, 1914, reversing a decree of Sayad Abdul Hasan, Subordinate Judge of Saharanpur, dated the 1st of May, 1914.

(1) (1898) I.L.R., 21 Mad., 464. (2) (1900) I.L.R., 23 All., 243.

1916

ABDUL KARIM v. ISLAMUN-NISSA BIBI.

not applicable, and the judgement-debtor withdrew his application and it was accordingly dismissed on the 2nd of July, 1913. On the 11th of July, 1913, the judgement-debtor made an application under section 47 of the Code of Civil Procedure for the same relief. It was entertained and allowed in part on the merits. On appeal the lower appellate court rejected the application as being barred by limitation under article 165, of the Limitation Act. The judgement-debtor appealed to the High Court.

Munshi *Haribans Sahai*, (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

Article 165 of the first schedule to the Limitation Act is intended to apply to cases where a person other than a judgement-debtor has been wrongfully dispossessed of property under colour of execution of a decree; i.e., to applications under order XXI, rule 100, of the Civil Procedure Code. It does not apply to a case where a judgement-debtor himself complains of wrongful dispossession not warranted by the decree and applies for restoration of possession. Such an application is one under section 47 of the Code of Civil Procedure and is governed by article 181 of the Limitation Act. In *Arjun Singh* v. *Mathelal Singh* (1) and *Laiman Das* v. *Jagan Nath Singh* (2), it was held that where a decree-holder had, in execution of his decree, seized or caused to be sold property in excess of what was warranted by the decree, the remedy of the judgement-debtor was not by way of a fresh suit but by an application under section 244 of the Code of 1882, and that the limitation applicable to such an application was that laid down by article 178 of the Limitation Act of 1877, which corresponds to the present article 181. The lower appellate court has relied on the cases of *Ratnam Ayyar* v. *Krishna Doss Vatal Dosa* (3) and *Har Lal Singh* v. *Lachman Singh* (4). The first of these cases gives no reasons for its decision; nor did the point directly arise, for the applicant was a minor and it was held that section 7 of the Limitation Act of 1877, saved the application from being time-barred. The second was not a case of excessive execution like the present; and, moreover, the case

(1) (1906) 3 A.L.J., 661.
(2) (1906) I.L.R., 32 All., 576.
(3) (1898) I.L.R., 21 Mad., 404.
(4) (1910) I.L.R., 32 All., 340.

1916

ABDUL KARIM v. BHAGWAN DIN.

was decided on the merits. Order XXI, rule 100, provides a special summary remedy which is available only to a stranger to the decree. Where the immovable property of a stranger is wrongfully seized under colour of execution, he has the option, if he chooses to adopt the speedy remedy provided by the said rule; and in that case article 165 provides that he must seek it within 30 days; but if he does not choose to adopt it he can bring a regular suit for possession any time within 12 years. This latter remedy by way of a suit is denied to a judgement-debtor, as was pointed out in the cases in 3 A.L.J.R., and I.L.R., 22 All., cited above. To hold that article 165 applies to an application like the present one made by a judgement-debtor would mean that if he does not come forward within 30 days his remedies are gone for ever and a person who has wrongly seized property without the shadow of a title becomes full owner on the lapse of that very short period. If a decree-holder realises one rupee in excess of what the decree awards him the judgement-debtor has three years within which to seek redress; *Mukt Raj* v. *Debi Dalal* (1), but if it is immovable property that has been seized in excess, then he has only 30 days, if article 165 applies. He has 12 years against any other person, but only 30 days against the decree-holder. These anomalies show that it could not have been the intention of the Legislature to make article 165 applicable to the case of a judgement-debtor. Further, this is a case where the doctrine of reviver can properly be applied and the present application may, if necessary, be regarded as in continuation of the first application for the same relief, which was dated the 18th of December, 1911, within 30 days of the dispossession. The mere quoting of wrong sections would not make that application unmaintainable and it could be amended by substituting the correct section, namely section 47. The court could act under order XLI, rule 33, of the Code of Civil Procedure.

Mr. *Nihal Chand*, for the respondents:—

There is nothing in the language of article 165 to warrant the construction sought to be put upon it by the appellant. The language is general and wide enough to include the case of a judgement-debtor as well as of a stranger to the decree. Article

(1) (1885) I.L.R., 7 All., 871

1916

ABDUL KARIM v. IBRAHIM-NISSA BIBI.

181 can only be invoked in aid by an applicant when there is no other article applicable here, article 165 is applicable. I rely on the cases of *Ratnam Ayyar* v. *Krishna Dass Vital Dass* (1) *Har Din Singh* v. *Lachman Singh* (2) and *Raja Ram* v. *Rani Itraj Kunwar* (3). Although in the second of these cases there was also a decision on the merits yet it was distinctly pronounced, at page 347 of the report, that the decision on the merits was unnecessary after the decision, that the judgement-debtor's application was barred by article 165. To limit the operation of article 165 to applications made by strangers alone, would be to do violence to plain and unequivocal language and to introduce words into that article which do not exist there. The possible hardship to a party that may result from interpreting a provision of law according to its plain meaning is not to be considered by the courts but should be left to the province of the Legislature. The law as laid down is the law to be administered. If the Legislature had intended article 165 to apply only to applications under order XXI, rule 100, it would have introduced in that article the words "any person other than the judgement-debtor" which occur in order XXI, rule 100. It is not an anomaly that the judgement-debtor should not have the same latitude as is allowed to a perfect stranger in cases of wrongful execution. The judgement-debtor is a party to the whole proceedings and knows about the matter If there is any wrongful execution as against him he ought to be prompt to seek redress, so that the matter which has been adjudicated in the suit between the parties may arrive at the conclusive stage as speedily as possible. Then, the first application having been withdrawn and dismissed it could not now be amended or revised. There was no prayer for amendment or review in the lower court.

PIGGOTT and WALSH, JJ. :—In this case an application was made to the Subordinate Judge, by the judgement-debtors under section 47 of the Civil Procedure Code, complaining of a seizure of immovable property belonging to them, made by the decree-holders in excess of their rights under the decree. The Subordinate Judge, after an elaborate inquiry, has found as a fact that the decree-holders took advantage of some ambiguous language in

(1) (1895) I L.R., 21 Mad., 404 (2) (1903) I.L.R., 25 All., 342.
(3) (1914) 17 Oudh Cases, 94.

1915

ABDUL KARIM v. ISLAMUNNISA BIBI.

the decree, and deliberately and dishonestly seized more than their decree entitled them to seize.

The decree was dated the 31st of March, 1911. The improper seizure took place on the 19th of November, 1911. The application in question was made to the Subordinate Judge on the 7th of July, 1913. This delay of nineteen months was due to the judgement-debtors having mistaken their rights and wasted time over a fruitless application. The reason, however, for the delay is immaterial. The delay itself has given rise to the question we have to decide.

The improper seizure by the decree-holders in excess of their rights under the decree, was clearly a question arising between the parties to the suit within the meaning of section 47. The application of the judgement-debtors was clearly made under that section.

On appeals being brought by both the decree-holders and the judgement-debtors, the District Judge, holding himself, as we think quite properly, bound by certain authorities mentioned hereafter, decided that the judgement-debtor's application was time-barred, on the ground that article 165 of the Limitation Act applied to it, and that the time of thirty days had run out.

We are clearly of opinion that when the matter is closely examined this view is untenable.

In a technical matter of this kind, when the language relied upon does not in express terms cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the court ought not to adopt a construction which has a restricting and penalizing operation unless it is driven to do so by the irresistible force of language.

Now in the ordinary course of things a person who is wrongfully dispossessed of immovable property has a remedy by a suit for possession only. In matters arising out of the execution of decrees, possibly because they are the indirect result of the active interference of the court itself, the Legislature has provided two exceptions. The judgement-debtor must apply to the court under section 47. If he is dispossessed of land which is outside the

1910

ABDUL KARIM v. INAYATULLAH BEG

decree, and he does not so apply, he loses his hand. He cannot bring a suit. He is worse off than the ordinary person wrongfully dispossessed. On the other hand, if a third person outside the suit is unfortunately the victim of some mistake in the decree itself, or by the decree-holder, he may apply to the court in a summary manner, and if he is right he may be put back into possession. That is expressly provided by order XXI, rules 100 and 101. Such a person is better off than the ordinary person wrongfully dispossessed. He can bring a suit, of course, within twelve years; but he can, if he pleases, apply summarily for possession. That is a privilege of a peculiar and special character, from which the judgement-debtor is excluded in express terms.

It is not surprising to find such a privilege accompanied by certain restrictions. By article 165 of the Limitation Act of 1908, (the article now in question) such an application must be made within thirty days. The article is in these terms:—"*Description of application*:—Under the Code of Civil Procedure, 1908, by a person dispossessed of immovable property and disputing the right of the decree-holder, or purchaser at a sale in execution of a decree, to be put into possession."

"*Period of limitation*:—Thirty days, from the date of dispossession."

Now that is a precise and compendious description of the right given, and the application allowed to "a person other than the judgement-debtor" by order XXI, rules 100, 101. It certainly applies to such an application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the Legislature enacted article 165, it had the provisions now contained in order XXI, rules 100, 101 in mind. That is to say, it intended article 165 to apply to such an application.

The argument for the view adopted in the reported cases, and followed by the District Judge in the case, is that the words are wide enough to include a judgement-debtor. Separated from their context this is true. A judgement-debtor is a "person", in such a case as this. Moreover, the judgement-debtor in his application under section 47 is complaining of the same sort of act as an applicant under order XXI, rule 100, would have to complain of. But the

1916

ABDUL KARIM v. SHEO NIRAN PRE

moment it is realized that what the schedule to the Limitation Act consists of is an enumeration of suits, appeals, and applications of various kinds, and that the language of article 135 is merely a definition or description, all difficulty as to the use of the word "person" disappears. In our opinion the word "person" in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by order XXI, rule 100, to make an application of that description.

To hold otherwise would result in this, that if a judgment-debtor applied to the court under order XXI, rule 100, and adopted the language of article 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postponed applying under section 47 for more than thirty days, the language of the article is to be applied to him.

If anything were required, outside the context in which the article is used, to assist us to an interpretation of it, we should be entitled, indeed in our opinion we should be bound, to recognize, that to hold as has been held by the District Judge in this case involves depriving the judgement-debtors for ever of all title to a considerable portion of immovable property, because they did not make a summary application with regard to its seizure within thirty days. Such a result in the case of a person already in straitened circumstances appears to us to be something which it is safe to assume that the Legislature never intended, and which it certainly never enacted in direct terms.

We are aware that this decision involves our departing from two authorities of some standing, to each of which we need hardly say we have given every consideration.

The first case is that decided by the Madras Court, *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (1). No reasons are given in the judgement nor was the decision necessary for the determination of that case. The second case was decided by this Court in the year 1909, *Har Din Singh* v. *Lachmin Singh* (2). In that case the appellant who succeeded in upholding the view from which we are dissenting also succeeded on the merits. It is not

(1) (1897) I.L.R., 21 Mad., 464 (2) (1903) I.L.R., 25 All., 343.

1916

ABDUL FARID v. ISLAMUNNISA BIBI.

unlikely that the considerations which have weighed with us were over-shadowed by the precedent which the Madras Court had already created, and by the argument on the substantial merits of the case. Another authority was cited to us from Oudh, *Raja Ram* v. *Rani Iraj Kunwari* (1). There the Judicial Commissioner, while apparently entertaining doubts of his own, seems to have felt himself unable to break away from the two authorities we have mentioned.

We may add that we are not unmindful of the fact that in certain other cases of applications which may be made by a judgement-debtor, such as an application for setting aside a sale, the judgement-debtor is limited to thirty days. There are obvious reasons why such an application, if made at all, should be made promptly. But it is sufficient to say that each case must turn upon the language used, and that in the case of an application to set aside a sale, the limitation is expressly provided in unmistakable language. The learned District Judge had before him appeals by both parties challenging the decision of the first court on the merits. He has disposed of both appeals on the preliminary finding that the application of the present appellants was time-barred. We therefore set aside the decree of the lower appellate court and direct that court to re-admit both the appeals on to its pending file and dispose of them according to law. The costs of this appeal on the higher scale and the costs in the court below will abide the event.

Appeal decreed and cause remanded.

(1) (1914) 17 Oudh Cases, 98

Before Mr. Justice Piggott and Mr. Justice Walsh.

JAGANNATH PRASAD (OBJECTOR) v. THE U. P. FLOUR AND OIL MILLS COMPANY LIMITED (OPPOSITE PARTY)*

1916 February, 29.

Act No. VI of 1882 (Indian Companies Act), sections 61, 125, 151—Company—Winding up—Contributory—Liability of contributory for calls.

Once a member of a Company is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound-up, that is to say, to the extent of his original share held in the company which remains unpaid he is liable to contribute to the assets of the company, for payment of the debts due to creditors and the expenses of the winding-up under section 61 of the Indian Companies Act, 1882. He is therefore liable in respect of unpaid calls, even though, as against the company the realization of such calls may have become barred by limitation. *Sonatji Jamrotji v. Ishwardas Jugdiwandas Shroff* (1) and *Vaidiswara Ayyar v. Siva Subramania Mudaliar* (2) followed.

THE facts of the case were as follows :—

The U. P. Flour and Oil Mills Company, was started as a limited company in 1904, with 2,000 shares of Rs. 50 each. Jagannath Prasad, the appellant in the High Court, applied for and was allotted 25 shares, and paid Rs. 10 per share. Subsequently the company made further calls for the balance of the share-money, which were not paid, and suits for recovery of such unpaid calls were alleged to have become time-barred sometime before 1913. In 1913, the company was, on a creditor's application, ordered to be wound up by the court and a liquidator was duly appointed. A list of contributories was prepared, and the name of Jagannath Prasad was also entered in that list without any objection on his part, and the amount of his liability was stated there to be Rs. 1,000. When called upon by the court, at the instance of the liquidator, to pay the said sum into court, Jagannath Prasad raised, *inter alia*, an objection, that the claim was time-barred. The District Judge overruled the objection. Jagannath Prasad appealed to the High Court.

Pandit *Kailas Nath Katju*, for the appellant :—

The claim of the liquidator in respect of unpaid calls which had been made by the company before the date of the winding-up

*First Appeal No. 150 of 1915, from an order of Mubarak Husain, Officiating District Judge of Cawnpore, dated the 8th of June, 1915.

(1) (1892) I. L. R., 20 Bom., 654. (2) (1907) I. L. R., 31 Mad., 66.

1910

JAGANNATH PUGRAD v. THE U. P. PAPER AND OIL MILLS COMPANY, LIMITED.

had become time-barred under article 112 of the Limitation Act, and should not have been allowed. The liquidator stood in no better or higher position than the company. He was merely substituted for the company. He could only recover what was in fact due to the company whether from share-holders or any other persons; *Waterhouse* v. *Jamieson* (1). Section 61 of the Indian Companies Act of 1882 did not enlarge the liability of the share-holders, or confer any higher rights upon the liquidator. Under clause (*d*) of section 61, a member of a company was only bound to pay "the amount, if any, unpaid on the shares in respect of which he is *liable* as a present or past member." A share-holder could not be said to be *liable* for sums which as against him had become time-barred long before the winding-up. Otherwise, unpaid calls which had been made, say, fifty years ago, could be recovered by the liquidator. The cases of *Sorabji Jamsetji* v. *Ishwardas Jugjiwan Dos Store* (2) and *Vaidisvara Ayyar* v. *Siva Subramania Mudaliar* (3) were no doubt against the appellant, but both the cases proceeded upon the decision in *Re Whitehouse and Company* (4). That was a case where a contributory was claiming a set-off. The present question did not arise there at all and it was submitted that the observations of JESSEL, M. R., in that case should be read in the light of, and with reference to, the facts before him. The right to set-off was expressly denied by section 61, cl. (*g*). It was not correct to say that the winding-up gave rise to a new liability altogether. The liability of the members of the company was defined by section 61, cl. (d), and that in terms excluded claims to recover unpaid calls which had become time-barred years before the winding-up. The mere fact that the name of the appellant had been entered upon the list of the contributories did not conclude the matter. The question was whether he was liable to pay a certain sum demanded from him by the liquidator, and that point could only be raised when such demand was in fact made and not earlier. The Companies Act provided a simpler procedure for the investigation of claims under the winding-up, but the claim of the liquidator was in all its incidents a suit by the company which was provided for by article 112 of the Limitation Act. (Reference was also

(1) (1870) 2 H. L. Sc. 345 D., 29.
(2) (1887) I. L. R., 20 Bom. 651.
(3) (1907) I. L. R., 31 Mad., 66.
(4) (1878) 9 Ch. D., 595.

1916

JAGANNATH PRASAD v. THE U. P. FLOUR AND OIL MILLS COMPANY, LIMITED.

made to sections 124, 125, 151 and 166 of the Companies Act of 1882).

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent :—

The present proceeding was under the summary procedure provided by the Companies Act, and was not a suit by the company and article 112 of the Limitation Act had no application. The present claim did not arise out of the contractual liability of the appellant to the company, but was founded on the liability imposed by the statute on the contributories to contribute to the assets of the company. The appellant had been declared to be a contributory, and that order having become final he could not now dispute the present claim. Liability to contribute arises only on the winding-up of the company and not earlier, and it extended to the whole amount which remained unpaid on the shares, and the fact that such amount had already been called by the company was entirely immaterial. (He referred to sections 124 and 125 of the Indian Companies Act of 1882.)

Pandit *Kailas Nath Katju*, replied.

PIGGOTT and WALSH, JJ :—In our opinion this appeal must be dismissed. A question of principle has been raised apparently for the first time in this Court, namely as to whether an unpaid call, due from a share-holder of a company, which has become statute-barred under article 112 of the Limitation Act, and has therefore ceased to be a recoverable debt by the company, may yet be recovered if at any date subsequent to its having become time-barred the company is wound-up. That question really depends upon the nature of the liability of a contributory and the provisions of the Indian Companies Act relating to winding-up. We entirely agree with the contention put forward by the appellant's counsel that so far as the recovery of the original debt based upon calls made by the company which has become time-barred is concerned, the liquidator has no higher right than the company. The company could not sue for these calls, no more can the liquidator. But the proceeding before us, as has been pointed out by the learned counsel for the respondent, is not a suit at all. What has happened is that in the performance of his duty the liquidator has put the appellant on the list of

1910

JAGANNATH PRASAD v. THE B. P. STOCK AND OIL MILLS COMPANY, LIMITED

contributories. Once a member of the company is upon the list of contributories,—unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories,—he is liable for all those matters in respect of which he may be charged in the event of a company being wound-up, that is to say, to the extent of his original share held in the company which remains unpaid, he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of the winding up under section 61 of the Indian Companies Act, No. VI of 1882. Now it is necessary to refer to section 125 of that Act in order to ascertain the nature of that liability. Section 125 provides as follows:—"The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability." Now it is quite clear that the contribution deals with under section 61, which is in itself a sort of correlative duty to the right which a share-holder has to have his liability, for any debt or expense of the winding up which the company may have incurred, limited to the amount of his original subscription, is not in itself a debt. But the Act says that for the purpose of recovery the amount shall be deemed to be a debt payable at the time or respective times when calls are made, and section 151 gives a court, power to make calls from persons on the list of contributories for the amount for which they are shown as liable in the list prepared by the liquidator: so that really it is not even the right of a company which is being enforced by a liquidator. It is a statutory right of the creditors of a company to enforce against the contributories of an insolvent company through the court the obligation which the share-holders took upon themselves when they originally subscribed in the event of insolvency subsequently overtaking the company. In our opinion the two decisions in *Soraljí Jamsetji* v. *Ishwardas Jugjiwandas Stove* (1) and in *Vaidisvara Ayyar* v. *Siva Subramanya Mudaliar* (2), referred to in the judgement appealed against were right, and were in

(1) (1898) I. L. R. 20 Bom., 851 (2) (1907) I. L. R. 31 Mad., 66.

accordance with the principles on which this question has always been considered under the English law and ought to be followed by us. We dismiss this appeal with costs.

Appeal dismissed.

1916

JAGANNATH PRASAD v. THE U. P. ELECTRIC AND OTHER MEDIA COMPANY, LIMITED.

1916 *March*, 20

FULL BENCH.

Before Justice Sir George Knox, Justice Sir Pramada Charan Banerji and Mr. Justice Piddell.

SOMWARPURI (PETITIONER) *v.* MATA BADAL AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1903 (Bundelkhand Alienation of Land Act), section 17—Mortgage executed by Collector—Stamp—Act. No. II of 1899 (Indian Stamp Act), section 3

Held that a mortgage executed by a Collector under the provisions of section 17 of the Bundelkhand Alienation of Land Act, 1903, is not exempt from stamp duty.

THIS was a reference by the Board of Revenue, under section 57 of the Indian Stamp Act, 1899, under the following circumstances. A decree upon a mortgage was passed by a munsif against Mata Badal, who was a member of an agriculturil tribe to whom the Bundelkhand Alienation of Land Act, 1903, applied. The munsif accordingly transferred the execution of the decree to the Collector under the provisions of section 17 of the said Act, and the Collector offered the decree-holder, Mahant Somwarpuri, Secretary of the Akhara Niranjani, a usufructuary mortgage of the judgement-debtor's property for twenty years in full satisfaction of the decree. The decree-holder accepted this offer and the Collector thereupon executed a mortgage-deed in accordance with the powers conferred upon him by the Act.

On this reference—

Mr. *A. E. Ryves*, for the Government :—

The document does not require any stamp. This is an ordinary Civil Court decree transferred under the Code of Civil Procedure to the Collector for execution. If the Collector had executed a lease it would not have required any stamp. It will not be equitable to demand stamp-duty twice, as for this very sum due stamp-duty had once been paid. There is a further

* Civil Miscellaneous No. 316 of 1915.

1916

SOMWARPURI v. MATA BADAL.

difficulty as to how the stamp duty is to be realized if the judgement-debtor does not care to pay. Different practices have grown up in different districts in a case like this. In some a registered instrument bearing one anna stamp is resorted to, in some of the others only an instrument bearing an anna stamp is executed and in others again only an instrument on plain paper is adopted. Hence this reference has been made to insure uniformity. I refer to item no 7 of remissions in Appendix C of the Stamp Manual. There is another way of looking at this matter. Section 3 of the Stamp Act exempts the Government from the stamp duty in the case of instruments which benefit the Government or are executed on behalf of the Government; why should the Government pay any duty when the document does not concern it? As to registration the Board of Revenue has no power to refer the matter to the High Court for opinion.

Babu *Sheodihal Sinha*, for the decree-holder:—

The Collector should order the mortgagor to pay the stamp duty. Option should be given to him at first. If he does not pay then the stamp duty should be realized from him as the costs of execution. All that we want is a valid deed without any blemish so that there might not be any dispute in the future.

KNOX, BANERJI AND TUDBALL JJ.:—The proceedings before us consist of a reference by the Chief Controlling Revenue Authority under section 57 of Act No. II of 1899. The case as stated to us is that on receipt under section 17 of the Bundelkhand Alienation of Land Act (II of 1903), of a decree passed by the Munsif of Allahabad against Mata Badal and others, the Collector of Allahabad offered the decree-holder, Mahant Somwarpuri, Secretary of the Akhara Niranjani, a usufructuary mortgage of the judgement-debtor's property for twenty years in full satisfaction of the decree. The decree-holder expressed his willingness to accept the offer and the Collector therefore executed a mortgage-deed in accordance with the powers conferred on him under the said Act II of 1903.

We have perused the particular deed and have considered its provisions. The question asked by the Chief Controlling Revenue Authority is whether this mortgage deed requires to be stamped and registered.

1916

SECRETARY OF STATE v. MATA BADAL

There is only one section in Act No. II of 1899, which sets out what instruments are instruments on which no duty should be chargeable. The Government has, however, power to remit duties under this Act in certain cases. As regards section 3 of Act No. II of 1899, we are of opinion that this mortgage-deed is not an instrument executed by, or on behalf of, or in favour of the Government. It is, as it purports to be, an instrument executed by the Collector of Allahabad, under the provisions of section 17 of the Alienation of Land Act No. II of 1903. Such instrument can in no way be said to be executed in favour of, or on behalf of Government; if anything, it is an instrument executed in favour of the mortgagee by the Collector on behalf of the mortgagor. No remission under which this document will fall has been pointed out to us and we know of none. Our attention was directed to the remissions set out in Appendix C of the Stamp Manual. There is a Government Order dated the 31st August, 1909, which expressly remits duty upon a fresh mortgage and executed in lieu of a previous mortgage-deed for the purpose of giving effect to the provisions of section 9, sub-section (2), of the Bundelkhand Alienation of Land Act, 1903. The document before us can in no sense be said to have been executed under section 9 of the Bundelkhand Alienation of Land Act. The existence of this exception points, if anything, to the conclusion that it was not the intention of Government to remit the duty on a document executed under section 17. This is our answer to the reference made to us under the Stamp Act.

With reference to the question whether the mortgage-deed requires to be registered, we know of no power conferred upon the Board of Revenue to refer questions to this Court under the Registration Act.

We therefore do not answer this part of the question.

Record returned.

1916
March, 11.

REVISIONAL CRIMINAL.

Before Sir Henry Richards, Knight, Chief Justice.
EMPEROR *v.* HUSAIN KHAN AND ANOTHER.*

Act No. XVI of 1908 (Indian Registration Act), section 82 and 83—Permission of registration officer a necessary previous condition to a prosecution.

Held that the permission referred to in section 82 of the Indian Registration Act, 1908, is a necessary condition precedent to the prosecution of any person for an offence mentioned in section 82 of the Act. *King-Emperor v. Juman* (1) referred to.

THE accused in this case were charged under section 82, Indian Registration Act, on the following facts. A forged will, purporting to be executed by Husain Khan accused and one Musammat Banno Bibi, was presented for registration and registered. Husain Khan appeared in person and Musammat Banno Bibi was alleged to have been personated by Musammat Wazira accused. These facts were brought to the notice of the Sub-registrar, by one Ashraf Khan who pressed for sanction under section 83 of the Registration Act, to prosecute the accused and this sanction was granted. Ashraf filed a complaint, but compromised the matter and the accused were discharged. Subsequent to this, the son of Ashraf filed another complaint against the same accused. The accused pleaded, *inter alia*, that no prosecution for an offence under section 82 of the Registration Act could be started without the permission of the officials mentioned in section 83 of the Registration Act. The trial court held that no sanction was required, but if it was necessary, the sanction given to Ashraf was sufficient to cover the present complaint. It convicted the accused and sentenced them to imprisonment and fine. On appeal by the accused, the Sessions Judge held that the sanction given to Ashraf could not cover the present complaint, but that no sanction was necessary. It confirmed the convictions and sentences. The accused applied to the High Court in revision.

Babu *Piari Lal Banerji*, for the applicant:—

"Section 83 laid down the ways in which it was permissible to start prosecution for an offence, viz. either on the complaint of

* Criminal Revision No. 121 of 1916, from an order of Ram Chandra Chaudhri, Officiating Sessions Judge of Allahabad, dated the 10th of January, 1916.

(1) (1914) 27 Indian Cases, 208.

1916

EMPEROR v. HUSAIN KHAN.

one of the officials named or on the complaint of some one to whom permission had been granted by some one of such officials. The use of the word 'may' did not show that the granting of permission was not obligatory. Section 83 would be rendered absolutely useless if any one could file a complaint without taking the permission of the registration officials. The only case of this Court in which this point had to be considered is reported in Indian Cases Vol. 27, p. 208. In this case TUDBALL, J., was decidedly of opinion that sanction was necessary. The Calcutta case reported in I. L. R., 11 Calc., 566, relied on by the Sessions Judge, gave no reason for holding that sanction was not necessary, whereas the earlier case of that Court reported in I. L. R., 10 Calc., 604, decided that sanction was necessary.

The Assistant Government Advocate (*Mr. R. Malcomson*), for the Crown:—

Section 83 was not worded in the same way as section 195 of the Criminal Procedure Code. There was no statutory enactment preventing a court from trying a person for an offence under the Registration Act, unless the sanction of some official of the registration department was obtained. The use of the word "may" showed the permission was not obligatory.

Babu *Piari Lal Banerji*, not heard in reply.

RICHARDS, C. J.—The accused have been convicted of an offence under section 82 of the Registration Act. The court below has found that the accused brought a certain document purporting to be a will executed by (amongst other persons) one Musammat Banno Bibi and had the document registered. The court has found that at the time of this registration Banno Bibi was dead. On this finding it is clear that an offence under section 82 of the Registration Act was committed. Section 83 of the Registration Act is as follows:—"A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector-General, the Branch Inspector-General of Sindh, the Registrar or Sub-registrar in whose territories, district or sub-district, as the case may be, the offence has been committed." The father of the present complainant got permission under section 83 to prosecute, but he compromised the case and dropped the prose-

1916

EMPEROR v. HUSAIN KHAN.

cution. This case accordingly must be dealt with on the assumption that no permission under section 83 was obtained. The applicant contends that the absence of this permission vitiates the conviction and that no court could take cognizance of an offence under the Registration Act unless permission under section 83 was first had and obtained. Section 83 seems neither very clear nor grammatical. Bearing in mind, however, that the offence is the creation of the Registration Act, and finds no place in the Penal Code, I think that the accused is entitled to the benefit of any ambiguity in the provisions of the Act. It is certainly not an unreasonable contention to be urged on his behalf that a prosecution for an offence under section 82 should not be commenced without the permission referred to in the section. It is said that the permission only refers to permission by a Registering authority. This seems hardly correct, because the different registering authorities are the very persons who are named by the section as the persons who should grant the permission. The applicant cites the case of *King-Emperor* v. *Jiwan* (1). It seems quite clear that TUDBALL, J., was of opinion that permission was necessary before a prosecution for an offence under section 82 could be commenced. I allow the application, set aside the conviction and sentence and direct that accused be set at liberty. The fine, if paid, will be refunded.

(1) (1913) 37 Indian Cases, 205.

APPELLATE CIVIL.

1916
March, 14.

Before Mr. Justice Piggott and Mr. Justice Walsh

LACHMI NARAIN (DEFENDANT) v. DARBARI LAL AND ANOTHER (PLAINTIFF).*

Civil Procedure Code, 1908, order IX, rule 2—Dismissal of suit—Appeal.

Held that no appeal lies from an order dismissing a suit under order IX, rule 2, of the Code of Civil Procedure, on the ground that summons had not been served on the defendants in consequence of the failure of the plaintiff to deposit the requisite court fee for such service. *Lucky Chand Choudhry* v. *Bukhsh-un-nissa* (1). *Parbati* v. *Toshi Kapri* (2), followed.

THE facts of the case were as follows :—

The respondent Darbari Lal instituted a suit against the appellant Lachmi Narain and others in the court of the Munsif. One of the defendants dying during the pendency of the suit an application was made to bring his heirs and legal representatives on the record. The application was granted, and the heirs' names were brought on the record. The plaintiff, however, failed to pay the necessary process fees and the Munsif on the date of hearing, finding that the defendants had not been summoned, dismissed the suit under order IX, rule 2, of the Code of Civil Procedure. Plaintiff having appealed the District Judge holding that the order of the Munsif was a decree, allowed the appeal and remanded the case for trial on the merits. The defendants appealed.

Babu *Sailanath Mukerji*, and Babu *Yatis Chandra Ray* for the appellants.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the respondent.—

PIGGOTT and WALSH, JJ. :—In this case the suit had been dismissed under the provisions of order IX, rule 2, of the Code of Civil Procedure. An appeal against this order of dismissal was entertained by the District Judge and resulted in an order directing the court of first instance to re-admit the suit on to its pending file and to dispose of it on the merits. Presumably the District Judge considered himself to be acting under order XLI, rule 23, of the Code of Civil Procedure. The matter has

* First Appeal No. 100 of 1915, from an order of A. G. P. Pullan, District Judge of Mainpuri, dated the 16th of September, 1915.

(1) (1882) I L R, 9 Calc., 1027. (2) (1913) 20 Indian Cases, 1.

1916

LACHMI NARAIN v. DARBARI LAL

been brought before us on appeal from the District Judge's order of remand. We think that no appeal lay to the District Judge. Authority for this proposition is to be found in *Lucky Chum Chowdhry* v. *Budurr-un-nissa* (1), and in *Parbati* v. *Teola Kapri* (2). It seems to be clear that the dismissal of the suit by the first court was a form of dismissal for default, and therefore excluded from the definition of the word "decree" in the present Code of Civil Procedure. The plaintiff's remedy was under order IX, rule 4, of the present Code and presumably, to some extent at any rate, it is still open to him. This appeal must prevail. We set aside the order of the District Judge and restore that of the court of first instance. The appellant is entitled to his costs in this and in the lower appellate court.

Appeal allowed.

1916
March, 14

Before Mr. Justice Piggott and Mr. Justice Walsh.

HARDWARI LAL (DECREE-HOLDER) v. SALAMAT-ULLAH KHAN, (OBJECTOR) AND AMAN-ULLAH KHAN (JUDGMENT-DEBTOR)*

Civil Procedure Code (1908), *order XXI, rule 90—Sale in execution of a decree—Application to set aside a sale by person claiming to be the real owner.*

Where immovable property has been sold in execution of a decree against the ostensible owner, a person claiming to be the real owner is not competent to ask the court to set aside the sale under order XXI, rule 90, of the Code of Civil Procedure. *Abdul Aziz* v. *Tafajjaddin* (3), referred to.

THE facts of this case were as follows:—

A mortgage decree was passed against one Amanat-ullah and the property mortgaged was sold on the 20th of March, 1915. On the 9th of March, 1915, Salamat-ullah, the father of Amanat-ullah, brought a suit for a declaration that he was the real owner of the property sold. Whilst that suit was pending, Salamat-ullah also applied under order XXI, rule 90, of the Code of Civil Procedure to have the sale set aside. The court below allowed his application and set aside the sale. The decree-holder appealed to the High Court.

* First Appeal No. 275 of 1915, from a decree of Seth Raghunandan Lal, Subordinate Judge of Shahjahanpur, dated the 24th of July, 1915.

(1) (1882) I.L.R., 9 Calc., 627. (2) (1918) 20 Indian Cases, 1.

(3) 33 Indian Cases, 939.

1916

HARDEVAN LAL v. SALAMAT-ULLAH KHAN.

The Hon'ble Dr. *Sundar Lal*, for the appellant.—

Salamat-ullah Khan has no *locus standi* to apply under order XXI, rule 90, of the Code of Civil Procedure, 1908. He is not a person whose interests are affected by the auction sale. It has been held that a person whose title is paramount to that of the mortgagor cannot be a party to the suit on the mortgage. His title being hostile to those of both the parties to the suit, he must go out of the record. His interests are not affected by the sale any more than they had been affected by the mortgage. As a matter of fact his title to the property has not been found one way or the other by the lower court. Even if it be proved that Salamat-ullah was the real owner his interests are not affected by the auction sale. Again if he be not really interested in the property he cannot apply. His remedy was by a separate suit and this remedy he has sought already. Comparing section 311 of the Code of Civil Procedure, 1882, with order XXI, rule 89, of the present Code it will be found that there has been a material change in the law. The rulings under the old Code have no bearing on the present question.

Dr. *S. M. Sulaiman*, for the respondents:—

Muhammad Salamat-ullah could not have intervened either in the suit or in the execution proceedings. He had therefore to stand by. Now if the real owner allows a property to be held *benami* and he stands by when the *benamidar* trasfers it to a third party, his interests are affected and hence he can apply under order XXI, rule 90, of the Code of Civil Procedure, 1908; *Abdul Gani* v. *A. M. Dunne* (1) and *Timmanna Banta* v. *Mahabala Bhatta* (2). There are no doubt rulings under the old Code, but the wording of the present Code (order XXI, rule 90) is more general; *Abdul Aziz* v. *Tafaj-uddin* (3). The sale was not after an ordinary attachment but in execution of a decree on a mortgage and when we have stood by at the time of the mortgage our interests are affected under section 41 of the Transfer of Property Act, 1882.

PIGGOTT and WALSH, JJ.:—This is an appeal against an order setting aside a sale under the provisions of order XXI, rule 90,

(1) (1893) I. L. R., 20 Calc., 418 (2) (1896) I. L. R., 19 Mad., 167

(3) 24 Indian Cases, 830.

1916

HARDWARI LAL v. SALAMAT-UL-LAH KHAN.

of the Code of Civil Procedure. The first point taken is that the application under that rule was made by one Salamat-ullah Khan who was neither the decree-holder nor the judgement-debtor, nor a person otherwise entitled to make any such application. We think this contention must prevail. The decree was one passed against Amanat-ullah Khan, a son of Salamat-ullah Khan aforesaid. It was a mortgage decree. A decree absolute was obtained on the 17th of January, 1913, and the sale actually took place on the 20th of March, 1915. In the meantime Salamat-ullah Khan had filed a suit, on the 9th of March, 1915, asking for a declaration that he was himself the real owner of the property covered by the mortgage and ordered to be sold in execution of the same. This suit is still pending. The question is whether under these circumstances Salamat-ullah is a person whose interests are affected by the sale, within the meaning of order XXI, rule 90, aforesaid. It is of little use to refer to reported cases which turn on the wording of section 311 of the former Code of Civil Procedure (Act XIV of 1882). There has been a substantial and intentional alteration in the law effected by the passing of the present Code. Nor is it of much use to refer to cases such as that of *Abdul Aziz* v. *Tafaj-uddin* (1), in which the learned Judge has remarked that the expression "whose interests are affected by the sale" has a wider import and a wider scope than the corresponding expression used in section 311 of Act XIV of 1882. For certain purposes the phrase used in the present Code may be a wider one, but we have to apply the words to the facts immediately before us. It seems to us that it would be a dangerous proposition to lay down that the interests of Salamat-ullah Khan are affected by the sale held on the 20th of March, 1915, while his declaratory suit was actually pending. To say that his interests are affected by that sale might be to pronounce an opinion as to the possibility of his success in the declaratory suit. If his property has been sold in execution of a decree obtained against his son, and he is not estopped by the provisions of section 41 of the Transfer of Property Act (Act IV of 1882), from setting up his true title, then the sale is a nullity as against him and cannot affect his interests.

(1) 23 Indian Cases, 839.

1916

HARDWARI LAL v. SALAMAT-UL-LAH KHAN

If, on the other hand, he has no real interest in the property in suit he should obviously not be permitted to maintain the application under order XXI, rule 90. We therefore accept this appeal; set aside the order of the court below, allowing the application of Salamat-ullah Khan, and direct the record to be returned to that court in order that it may proceed to pass all necessary orders confirming the sale and to dispose of the matter in accordance with law. The appellant will get his costs of this appeal.

Appeal decreed.

1916 *March*, 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KHURSHED ALI AND OTHERS (PLAINTIFFS) *v.* ABDUL MAJID AND OTHERS (DEFENDANTS) *

Pre-emption—Pre-emptor—Mortgage—Use of the terms "mukhuma" not sufficient to constitute a mortgage.

The material portion of a document executed by the borrowers to secure a loan was as follows:—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makhuza*) and if the creditors make delay in realizing the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makhuza*)."

A claim for pre-emption was brought based upon this document, which was claimed to be a sale, or at least a mortgage.

Held by RICHARDS, C. J., that it was very difficult to distinguish the transaction evidenced by the document in question from what is ordinarily called a "simple mortgage". On a construction, however, of the wajib-ul-arz it was held not to include mortgages which did not involve a change of possession.

Held by TUDBALL, J., that the document under consideration did not amount to a mortgage, but at most constituted a charge on the property referred to therein. *Dalip Singh* v. *Bahadur Ram* (1), referred to.

THIS was a suit for pre-emption based upon the wajib-ul-arz and upon a document executed by the defendants, the material portion of which was in the following terms:—

* Second Appeal No. 1769 of 1914, from a decree of Durga Dutt Joshi, District Judge of Azamgarh, dated the 26th of October, 1914, reversing a decree of Sura Narain Misir, Subordinate Judge of Azamgarh, dated the 26th of July, 1914.

(1) (1912) I.L.R., 34 All., 446

1916

ENCUMBERED ALI v. ABDUL MAJID.

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makhuza*) and if the creditors make delay in realising the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makhuza*)"

The plaintiffs came into court alleging that in reality the transaction was sale and that they were entitled to get possession upon payment of the consideration. They further claimed, however, in the alternative that if the transaction was a mortgage they might be substituted for the mortgagees. The court of first instance held that the transaction was not a sale, but a mortgage, and granted the plaintiffs the alternative relief. The lower appellate court agreeing with the court of first instance that the transaction was not a sale and that the document merely operated as a "charge" on the property, held that there was no right of substitution and accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Maulvi *Iqbal Ahmad*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs seek to enforce their claim for pre-emption The document which gave rise to the alleged cause of action is in the following terms :—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makhuza*) and if the creditors make delay in realising the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makhuza*)."

The plaintiffs came into court alleging that in reality the transaction was a sale and that they were entitled to get possession upon payment of the consideration. They further claimed,

1916

however, in the alternative that if the transaction was a mortgage they might be substituted for the mortgagees. The court of first instance held that the transaction was not a sale, but a mortgage, and granted the plaintiffs the alternative relief. The lower appellate court, agreeing with the court of first instance that the transaction was not a sale and that the document merely operated as a "charge" on the property, held that there was no right of substitution, and accordingly dismissed the suit.

BEGUMBUX ALI v. ABDUL MAJID.

Section 58 (clause b) of the Transfer of Property Act is as follows:—"Where without delivering possession of the mortgaged property the mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

If we omit from the definition the words, "mortgage" and "mortgaged" and substitute for the word "mortgagor" the word "borrower" and the word "lender" for the word "mortgagee," the document in question seems to me to come clearly within the definition of a 'simple mortgage.' The borrowers had bound themselves to pay the money lent and had agreed that in the event of the money not being paid, the lenders should have a right to cause the property made security for the loan to be sold. I have substituted the words "borrowers" and "lenders" for "mortgagors" and "mortgagees" in order to get over the difficulty created by the previous part of section 58, which defines "mortgagor" as "the transferor of an interest" and "mortgagee" as "the transferee of an interest." I do not think the substitution alters the meaning of the clause. I think what are ordinarily treated as "simple mortgages" in these provinces are not strictly "simple mortgages" within the definition of section 58, because I think there is in almost all these documents no "transfer of an interest" in specific immovable property for the purpose of securing the payment of money advanced. If therefore I was satisfied that the present plaintiffs were entitled to be substituted for what is generally called a simple mortgagee, I would hold that

1916

ENCHSEED ALI v. ABDULMAJID.

they were entitled in the present case to be so substituted, because I find the greatest difficulty in distinguishing the transaction which is evidenced by the document in question from what is ordinarily called a "simple mortgage." The mere fact that a somewhat unusual word (*makhmza*) is used, does not make the document either more or less a "simple mortgage" than if the more usual word "maqful" or "mustagaraq" was used.

There remains the question whether or not the plaintiffs have proved the existence of a custom which gives a right to be substituted in the case of what is ordinarily called a simple mortgage The only evidence adduced in support of the alleged custom is the wajib-ul-arz of 1872. The entry is in the following terms:—"If any co-sharer wishes to make a transfer of any kind, he will first do so to a *hissadar karibi*, next to the *hissadar* of that *thok*, next to the *hissadar* of another *thok*. If none of the co-sharers of the village takes it he may then transfer it to a stranger. If he does not conform to it, then *hissadar karibi*, *hissadar thok*, and *hissadar* of another *thok*, according to the aforesaid order of priority, have the preferential right to take the property by pre-emption. If at the time of the issue of a proclamation or at the time of the expiry of the limitation prescribed in clause 15 of section 1 of Act XIV of 1859, or of any other Act relating to redemption of mortgage (*chorane miadi rehan*), the owner of the property be not capable of redeeming, or do not wish to redeem, then *hissadar karibi*, *etc.*, had power to take the property for himself by depositing the mortgage-money together with the costs. If any *hissadar* of *arazi* or *hissa* take any additional sum of money from the creditor to whom the property is mortgaged (*rehan kai*) by making a *maqful* of the same property, then the terms of the mortgage bond will apply to the said debt also."

It seems to me that this record points very much to transactions which involve an actual change of possession. According to the most natural meaning of the earlier part of the clause transactions of this kind seemed to be contemplated. Then the latter part of the record deals, I think, with possessory mortgagee and shows that the right intended to be recorded was that

1916

KRISHNAJI ANT v. ANNUL MAHTO

even where co-sharers had not availed themselves of their right when the transfer was originally made, they would still have a right of getting the property at any time before the right of redemption was entirely gone It was pointed out, and no doubt correctly pointed out, that the word *intiqal* (transfer) is a very general word and includes all classes of transfers, but in my opinion the decision does not depend upon the interpretation to be put upon particular words occurring in the wajib-ul-arz The extract from the *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not the custom exists The record is supposed to be the record of an old custom existing for a long time, and I think that it will be found that in olden times mortgages without possession (or at least the right to possession) were hardly recognised. In my judgement the mere production of the extract from the wajib-ul-arz was insufficient to prove the existence of the custom which it is necessary for the plaintiffs to prove in order to entitle them to be substituted for the defendants. On these grounds I would dismiss the appeal.

TUDBALL, J.—I agree that the appeal fails, chiefly for the reason that I have considerable doubt that the parties to the document in suit ever intended to create a mortgage at all Assuming that the custom as alleged by the plaintiff does exist and that the mortgage falls within that custom, the bond in question does not use the ordinary vernacular terms which are used in these provinces when parties wish to create a mortgage and give the mortgagee the right to sell the property Beyond doubt it is difficult to distinguish between a document which merely creates a charge and a simple mortgage But where are certain terms which are in common use in these provinces in vernacular documents when the parties wish to create what is commonly known as a simple mortgage. The word *makhuza* which is used in the document has been considered and discussed by a Bench of this Court in *Dalip Singh* v. *Babadur Ram* (1), and I agree with the conclusion of the learned Judges who constituted that Bench, that in using this word the parties can hardly be said to have contemplated anything more than a charge.

(1) (1912) I. L. R., 34 All. 449.

1916

KRISHNEN AND v. ABDUL MAJID

It was for this reason that the court below dismissed the suit. I must also add that I have considerable doubt that the custom which the plaintiff has put forward as evidenced by the wajib-ul-arz ever contemplated a case like the present. However, as the appeal in my opinion ought to be dismissed on the other ground, I think it unnecessary to decide this point.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

FULL BENCH.

1916

March, 24.

Before Sir Henry Richards, Knight, Chief Justice, Mr Justice Tudball and Mr Justice Muhammad Rafiq.

JAGRANI (PLAINTIFF) *v.* BISHESHAR DUHE AND OTHERS (DEFENDANTS)*

Act No XVI of 1908 (Indian Registration Act), sections 17 and 49—Registration—Petition to Revenue Court to mutation proceedings—Compromise—Family settlement.

A separated Hindu created two usufructuary mortgages on portions of his estate, and then died leaving a widow and a daughter. The widow held possession for her lifetime and created a third usufructuary mortgage. She died. Her daughter filed claim to the estate and applied for entry of her name in the revenue records. M, one of the reversioners, contested her application, urging that her father was joint with him and not separate. The parties came to terms, orally. The daughter agreed to give up her claim, M, in return, agreed to take the estate, to pay off the mortgages and to pay a certain sum to the daughter. They two then filed a joint petition in which it was stated that the parties had come to terms. This statement in the petition was followed by another on behalf of the daughter that as she had given up her claim to the estate she had no objection to mutation of names being made in favour of M. The Revenue Court's order was that mutation was to be made according to that compromise. M to secure to the daughter the payment of the money which he had promised to pay, executed two bonds in favour of her sister's husband, but he never paid the money due thereon; on the contrary he managed to get the bonds back and kept them. Some time afterwards the daughter sued to recover possession of the property in dispute.

Held that in the circumstances the plaintiff was entitled to a decree conditioned on her paying the amount due on the mortgages.

This was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The

* Appeal No. 4 of 1915 under section 10 of the Letters Patent.

appeal before the single Judge is reported in 12 A.L.J., p. 1316.

1916

JAGRANI v. BISHESHAR DUBE.

The facts were as follows:—

The property in dispute belonged to one Chandrika Dube after whose death it was recorded in the name of his widow Musammat Amrani. Musammat Amrani died in 1900, and the patwari submitted a report that the name of the plaintiff who was her daughter should be recorded in her place. One Mulai, the father of the defendants and brother of Chandrika, objected to mutation on the ground that the family was joint and the plaintiff was not an heir under the Hindu Law. The matter was, however, compromised the effect of which was that Jagrani withdrew her claim on condition, the defendants executed two bonds for certain amount in her favour. The Revenue Court ordered "mutation according to compromise." Thereafter the defendants remained in possession for nine years and discharged certain debts which were contracted either by Chandrika or Amrani. In 1910, the plaintiff brought this suit for recovery of the property on the ground that she was entitled to it by right of inheritance, that she never executed the compromise and that a fraud had been practised upon her. The defendants relied upon the compromise and pleaded that the family was joint, and that the plaintiff was unchaste and therefore could not inherit under the Hindu Law. They further pleaded that the plaintiff was bound to refund all the benefit which she had received under the compromise if it was held not binding upon her. The courts below dismissed the suit holding that the plaintiff "relinquished her rights" in favour of the defendants fully knowing the contents of the compromise and their effect upon her interests and therefore the compromise was binding upon her. The plaintiff's plea that the compromise was not admissible in evidence without registration was overruled. A learned Judge of this Court affirmed the decision of the court below after getting certain findings which are not material for this report. The plaintiff appealed.

Mr. *G. W. Dillon* (with him Munshi *Haribans Sahai*), for the appellant:—

There are two questions which the Court has to decide. First, whether the compromise could be admitted in evidence

1916

JAGRANI v. BISHESHAR DUBE

without registration, and, secondly whether the plaintiff's suit was liable to dismissal inasmuch as she did not offer to pay up the mortgages made by her father and mother. On the first question the court below has now found that the father of the plaintiff was separate from his brothers and consequently the plaintiff had a right to inherit the property in dispute. This right she relinquished under the compromise, that is to say, she purported to transfer her rights to the defendants. The compromise therefore fell under section 17 of the Registration Act and was compulsorily registrable. Even if it is admitted in evidence it would not affect any property. Refer to section 49 of the Registration Act. If the compromise does not purport to transfer any interest to the defendants they have no right to the property and the plaintiff is entitled to possession, inasmuch as it has been found that the title is in her. Suppose no case had been instituted but the parties had come to an arrangement similar to the one in the present case and recorded the arrangement it would not only have been compulsorily registrable but would have been liable to stamp-duty. The document is not exempt from registration as being incorporated in a decree. In the first place the Revenue Court only passes an executive order, and not a decree, and secondly the compromise is not incorporated in that decree or order. The following cases were cited as supporting the proposition that the compromise required registration. *Sadarud-din Ahmad* v. *Chajju*, (1) *Bharosa* v. *Sikhdar*, (2) *Pennal Anni* v *Lakshmi Anni*, (3) *Bhagwan Sahai* v. *Har Chain*, (4) *Deo Chand* v. *Pearay*, (5) *Mahadeo Singh* v *Jagmohan Singh*, (6) *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (7).

Dr. *Surendra Nath Sen* (with him Munshi *Jang Bahadur Lal*), for the respondents :—

The defendants do not rely upon the document as showing their title to the property. There was a dispute between the plaintiff on the one hand and the defendants on the other in which the defendants claimed the property as their own. In 1907, the parties were

(1) (1908) I.L.R., 31 All., 13

(2) (1914) 12 A.L.J., 903.

(3) (1899) I.L.R., 22 Mad., 503

(4) (1911) I.L.R., 33 All., 475.

(5) (1914) 12 A.L.J., 1123.

(6) (1911) 25 Indian Cases, 34.

(7) (1911) 13 Indian Cases, 317.

1916

JAGDEAT v. BHEKHARI DUBE

doubtful as to the claim. The plaintiff admitted their antecedent title and this admission was recorded in the document. It does not purport to be, or operate as, a transfer of property. It is only a family arrangement and as such does not require registration. *Stapilton* v. *Stapilton*, (1) lays down that an arrangement entered into upon a supposition of a right or of a doubtful right, though it comes out after that the right was on the other side, is a family settlement. The case here is exactly similar. The Transfer of Property Act does not apply to a family arrangement which does not amount to an alienation. The Registration Act does not apply to a transaction which is not in writing. The petition addressed to the Revenue Court was an intimation about the withdrawal of a claim, which had taken place without the drawing up of any formal instrument. Sale, lease, mortgage, exchange and gift require registration under certain circumstances and must be in writing as provided by the Transfer of Property Act. The law of Registration applies to these documents and not to transactions like the one in the present case. Here there is neither sale, gift nor exchange; it is not a transfer of title. (Refers to section 9 of the Transfer of Property Act.) In each case the nature of the compromise should be looked to. If it involves a transfer of title it will require registration. The defendant's claim is founded upon family arrangement and not on relinquishment. The Privy Council have laid down a general rule of law in *Khunni Lal* v. *Gobind Krishna Narain* (2). In case of family arrangement no property is transferred. It does not even require a document and if a document is executed narrating that a settlement has already taken place it need not be registered. Family settlements are based upon the assumption of an antecedent title, and any document embodying the arrangement merely acknowledges or defines the said right. It does not amount to an alienation; *Musammat Hiran Bibi* v. *Musammat Sohan Bibi*, (3) *Khunni Lal* v. *Govind Krishna Narain* (2). Further the document is not a deed of relinquishment. It does not extinguish or limit any right as the plaintiff had no right which she could relinquish. Section 17 of the Registration Act requires only those documents

(1) 1 Wh. and Tudor's Eq. Cases, 223. (2) (1921) I.L.R., 43 All., 338.
(3) (1914) 18 C.W.N., 998.

1916

JAGRANI v. BISHESHAR DUBE

to be registered which purport to create, assign, etc., a right in favour of another. This the document does not do. It is only an intimation given to the Revenue Officer that the parties have arrived at an understanding. The petition of compromise not being relied upon either as a title deed or as a document modifying the terms of a registered instrument or as an agreement relating to property outside the scope of the order of the Revenue Court and the said order not being relied on as *res judicata*, the rulings in 22 Mad., 508, 31 All., 13, 32 All., 206, 8 A. L. J., 309, and 33 All., 378, do not apply.

Reference was made to *M. R. M. A. Subramanian Chettiar* v. *Rajah Rajeswara Dorai* (1), *Nur Ali* v *Imaman* (2), *Bindeshri Naik* v. *Guruja Saran Sahu* (3), *Kokla* v. *Piarelal* (4), *Daya Shanker* v. *Hub Lal* (5), *Sital Prasad* v *Lal Bahadur* (6).

The order of the Revenue Court is an order in a judicial proceeding and if the compromise has been given effect to by the mutation court which was a proper judicial proceeding it satisfies the test laid down by the Privy Council in I. L. R., 20 All., 171

Mr. *G. W. Dillon*, replied.

RICHARDS, C. J.—This appeal arises out of a suit for possession of immovable property brought by one Musammat Jagrani Misrani. The court of first instance dismissed the plaintiff's suit. The court of first appeal confirmed this decree and a learned Judge of this Court dismissed the second appeal,

Nirban Dube had three sons, Gulab Dube, Chandrika Dube and Ramphal Dube. Chandrika Dube left him surving his widow and his daughter (the present plaintiff). On the death of Chandrika Dube the name of the widow was recorded, and continued to be recorded up to the time of her death. Ramphal Dube had a son Mulai Dube. The defendants are the sons of Mulai Dube. On the death of the widow of Chandrika Dube disputes arose between Jagrani on the one side and Mulai Dube on the other as to whose

(1) (1915) 30 C.W.N., 20., 223
(2) Weekly Notes, 1884, p. 40.
(3) (1897) 1 L. R., 20 All., 171.
(4) (1913) I.L.R., 35 All., 502.
(5) (1914) I.L.R., 37 All., 105.
(6) (1915) 13 A.L.J., 1122.

1916

JAGRANI v. DIGPHARAN DUBE.

name should be recorded. Apparently Jagrani was claiming that the sons of Nirban Dube were separate, that on the death of her father Chandrika Dube his widow was not only recorded but she was entitled to the property, and that upon the death of the widow the plaintiff became entitled to the property for the estate of a Hindu female Mulai Dube, on the other hand, was apparently claiming that Chandrika Dube and Ramphal Dube were joint and that the name of the widow of Chandrika was recorded merely for consolation. It has been definitely found by the court below that Chandrika Dube and Ramphal Dube were separate On this finding it is clear that the plaintiff is entitled to possession of the property unless the defendants can show that she transferred her interest or that they have some other legal or equitable defence.

I now propose shortly to state what actually happened according to the findings of the court, apart altogether from legal questions such as the admissibility of evidence. I have mentioned the dispute which occurred on the death of the widow of Chandrika. The dispute was in mutation proceedings. This matter ended by an application filed on behalf of the plaintiff in which she stated that the matter had been compromised, that she gave up her rights to the property and that the name of Mulai might be recorded. The order which the mutation officer made on this petition was as follows—" mutation according to the compromise." The name of Mulai was accordingly recorded. It appears that the full arrangement (which does not appear in the petition) between the parties was that certain debts due by the plaintiff's father and mother should be paid off including a debt incurred for the marriage expenses of the plaintiff's daughter. Mulai executed two simple money bonds in favour nominally of a third party but really for the benefit of the plaintiff. Mulai managed to get back these bonds and the plaintiff never got the amount nor did Mulai discharge them They are long since barred by limitation. The plaintiff alleged that this compromise was brought about by fraud and that she knew nothing about it. The courts have found that fraud was not proved, that the plaintiff knew what she was doing although the consideration was inade-

1916

JAGRANI v. BISHESHAR DOBE.

The petition to the Revenue Court was not registered. Save this document and the order of the mutation officer the defendants were unable to adduce any evidence showing that the plaintiff had transferred her interest in the property in dispute. The learned District Judge was of opinion that the "mutation proceedings" were "judicial proceedings" and that the mutation officer by this order "mutation according to compromise" had incorporated the compromise into his decree, and applying the ruling of their Lordships of the Privy Council in *Bindesri Naik v. Ganga Saran Sahu* (1), the learned Judge held that the interest of the plaintiff had been transferred as the result of the compromise and the decree in mutation proceedings.

It seems to me that this view is wrong. The mutation proceedings were not judicial proceedings, nor was there any decree which could possibly have the effect of transferring the interest of the plaintiff. All that the mutation officer had to do or had jurisdiction to do, was to order whose name should be recorded. The parties consented that the name of Mulai Dube should be recorded, but this conferred no title upon him. In my opinion (if we disregard the petition) the interest of the plaintiff is not proved to have been transferred and on the findings of the court below she is entitled to possession subject to paying off the usufructuary mortgages which are mentioned in the judgement of the learned Subordinate Judge.

Having regard to the fact that Mulai never paid up the amount of the bonds I think that this would meet the justice of the case and I would modify the decree accordingly.

This case was referred to a Bench of three Judges on account of the conflict, or supposed conflict of authorities on the subject of the admissibility of compromise proceedings in the Revenue Court and many cases have been cited by each side. Section 17 of the Registration Act provides that certain documents must be registered and amongst others "non-testamentary instruments which purport or operate to create, to declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property." The words are

(1) (1897) I.L.R., 20 All., 171.

very wide and comprehensive. Section 49 provides that no document required by section 17 to be registered shall (a) affect any immovable property comprised therein, or . . . (c) shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered." It seems to me that if the petition to the Revenue Court in the present case was such a document as is referred to in section 17 it was clearly inadmissible in evidence to prove that the interest of the plaintiff had been transferred. If the petition was not such a document as is referred to in section 17, then it could not of course be rejected as inadmissible on this ground and the document was admissible provided it was otherwise relevant to the case. It must be remembered that a document cannot be received in evidence on the ground that it does not "purport or operate" as an assignment or relinquishment of rights in the property and then be used by the court for the very purpose of showing that the right was relinquished or assigned. It is said that the transaction in the present case was a "family arrangement" and it is urged that documents connected with "family arrangements" need never be registered. I think that there is no justification for such a proposition. Documents which disclosed "family arrangements" and which at the same time "purport or operate" to create, declare, assign, limit, or extinguish, etc, must be registered, just as much as any other documents unconnected with "family arrangements." Nor do I think that any of the cases in which their Lordships of the Privy Council have considered "family arrangements" can be used as authorities for the proposition that such documents are exempt from the provisions of the Registration Act. Documents which cannot be objected to for want of registration are of course admissible provided they are relevant to some issue in the case and unobjectionable on any other valid ground. It is needless to add that it is quite impossible to lay down any definite rule as to the admissibility of applications and orders in mutation proceedings. Each case must be dealt with according to law. I would like to point out that the proper time to object to the admissibility of a document in evidence is when the document is tendered. It is obviously as a general rule unfair and improper that parties should be allowed to raise

1916

JAGMANI v. BISHESHAR DUBE.

objections as to the admissibility of evidence, documentary or otherwise, for the first time in appeal. When a document tendered as evidence, or a question to a witness, is objected to as inadmissible it is the duty of the Judge to rule on the objection and if he admits the document or allows the question to be asked notwithstanding the objection the Judge should note that the objection has been made. This elementary rule of procedure is very frequently altogether lost sight of both by the court and by pleaders.

TUDBALL, J.—The facts as found may be briefly stated as follows:—A separated Hindu created two usufructuary mortgages on portions of his estate, and then died leaving a widow and a daughter. The widow held possession for her life-time and created a third usufructuary mortgage. She died. Her daughter laid claim to the estate and applied for entry of her name in the revenue records. One Mulai, "*one*" of the reversioners, contested her application, urging that her father was joint with him and not separate. The parties came to terms, orally. The daughter agreed to give up her claim, Mulai in return agreed to take the estate, pay off the mortgages and to pay a certain sum of money to the daughter (who is the present plaintiff). They two then filed a joint petition in which it was stated that the parties had come to terms. This statement in the petition was followed by another on behalf of the plaintiff, that as she had given up her claim to the state, she had no objection to mutation being made in favour of Mulai. To this was added a statement by Mulai that as the plaintiff had given up her claim he did not press for costs. The Revenue Court's order was that mutation was to be made according to that compromise. Mulai to secure to the plaintiff the payment of the money he had promised to pay executed two bonds (simple ones) in favour of the husband of the plaintiff's sister. Instead, however, of paying the money he took back those bonds and made it impossible for any one to sue on them.

The plaintiff has now come, some eleven years after her mother's death, into court and sues for possession of the estate. Her claim has been dismissed on the ground that there was a *bona fide* compromise with consideration and that therefore she

1916

JAGRANI v. BISHESHAR DUBE.

has lost her rights which she relinquished under the compromise in the Revenue Court. She in her plaint sued to have the mutation order set aside on the ground of fraud, but the courts have held that though the consideration was very inadequate she has fully understood the transaction and there had been no fraud.

It seems to me difficult to hold that the petition filed in the Revenue Court wherein the parties expressed their willingness to have the name of Mulai recorded in the revenue registers is a document which purported or operated to extinguish the right, title and interest of the plaintiff. If the parties had executed and registered a document setting forth the terms of the agreement and the plaintiff had therein recorded that she thereby gave up all such right as she might have, even then they would have had to file this same petition before the revenue officer. Nowhere in this document did the plaintiff say "I hereby relinquish all such right, title and interest as I may have in the estate of my father." She merely stated that as she had given up her claim to the estate she agreed to the entry of Mulai's name. The document does not purport to be a deed of relinquishment. It did not even contain all the terms of the agreement.

It does not appear to be such a document as is contemplated by section 17 of the Registration Act and required no registration. It is worthy of note that it was let into evidence in the trial court without objection of any sort and it was too late to object to its admissibility when the case went on appeal to the lower appellate court.

Though perhaps it may be only "*obiter dictum*" to express an opinion on the point, still as it has been argued before us, I think it well to say that if this document were one which purported or operated to extinguish the plaintiff's title, registration thereof would in my opinion be compulsory. The Revenue Court is one of very restricted jurisdiction and in the present instance was concerned only with the change of names in the revenue records. It had no power to decide the question of title at all as between the parties, or to make any declaration in regard thereto. It could pass no decree embodying a compromise, such that Mulai could have put it into execution and thereby obtained possession. As far as it was concerned, it had to do only with so much of the

1916

JAGRANI v. BISHESHAR DUBE.

compromise as allowed the name of Mulai to be recorded in the village *khewat*. Over matters outside the scope of its jurisdiction it had no power.

As regards the plea that there was a family settlement and the court ought not to go behind it, it hardly lies in the mouth of the defendants to raise it. Where a family settlement, *bonâ fide* and free of fraud, is made and acted upon by *all* the parties, even though a full and proper document be not duly executed and registered, the courts have refused to go behind it. But in the present case Mulai did not act fully upon it. He took the property and paid off the mortgages, but failed to pay to the plaintiff the amount which he had promised to pay. He dishonestly got back the two bonds he executed and left the plaintiff with nothing. In these circumstances as the plaintiff has not transferred her title by a document duly executed and registered, I think we are entitled to go behind this so-called family settlement (to which by the way, the other reversioners were no parties).

I would therefore reverse the decisions of the courts below, decree possession to the plaintiff subject to her making good to the defendants the sums of money, if any, spent in the redemption of the three usufructuary mortgages.

MUHAMMAD RAFIQ, J.—This is a Letters Patent appeal and the point for consideration is whether an unregistered compromise affecting immovable property of the value of more than Rs. 100 filed in a Revenue Court upon the basis of which mutation of names has been effected is admissible in evidence in a subsequent Civil suit between the parties disputing the right to the said property. The case has been referred to a Full Bench because of the alleged conflict of case law in this Court. The relevant facts of the case are these:—One Chandrika Dube died some years ago possessed of the property in suit and leaving him surviving a widow and a daughter. The latter is the plaintiff appellant in the present case. On the death of Chandrika his widow, Mussammat Anurani, entered into possession and the mutation of names was made in her name. She died in 1910. On her death her daughter applied for mutation of names in her favour and Mulai, a nephew of Chandrika, objected and claimed to have his name entered. On the 12th February, 1901, a petition of compromise was presented to the Assistant

1916

JAGRANI v. BISHESHAR DUBE.

Collector in which it was stated on behalf of Musammat Jagrani the daughter that she withdrew and relinquished her claim to the inheritance in the property of Musammat Anurani, her mother, and that the name of Mulai should be entered in the revenue records; and on behalf of Mulai the statement was that as Musammat Jagrani had relinquished her claim he did not press for costs. The Assistant Collector ordered:—"Let mutation be made according to compromise." On the 24th of November, 1911, Musammat Jagrani brought the suit out of which the this appeal has arisen for the recovery of possession of the property which had been in the possession of Mulai and after his death, of his sons, the defendants in the present case, by virtue of the compromise of 1901. She challenged the compromise on the ground that she had not entered into it knowing its full effect and that a fraud had been practised on her and that it was without consideration. She further alleged that her father, Chandrika Dube, was separate from his brothers, one of whom was Mulai's father. The claim was resisted on various pleas. The validity of the compromise was set up and it was urged that it was entered into by Musammat Jagrani with full knowledge of its contents and of its effect upon her interests and that it was for consideration. It was further alleged that Chandrika was joint with his brothers and their sons and that Mulai had paid off mortgages of Chandrika and his widow Musammat Anurani. The court of first instance found that Chandrika was separate from his brothers and their sons, and that the compromise in question was made by Musammat Jagrani with full knowledge of its contents and its effect upon her interests and that no fraud had been practised on her. The claim was accordingly dismissed. On appeal the decree of the first court was affirmed. On second appeal a learned Judge of this Court remanded the case for trial of certain issues, one of which related to consideration. The findings on the remanded issues were against the plaintiff appellant except on the question of consideration. It was found that consideration had passed, but it was inadequate. The appeal was accordingly dismissed. On behalf of the plaintiff appellant the contention before us is that the compromise presented to the Revenue Court on the 12th of February, 1901, on the basis of which mutation of names was

1916

JAGRANI v. DESHESHAR DUBE.

made in favour of Mulai is inadmissible in evidence, and it does not operate as the relinquishment of her right in the property in suit by the plaintiff appellant, because the compromise affected property of the value of more than Rs 100 and was not registered. For the respondents the reply is tow-fold. It is contended on their behalf that the petition presented to the Revenue Court on the 12th of February, 1901, was not a compromise but merely a report or information to the Revenue Court of a compromise that had been orally made outside court and that a compromise need not be in writing or registered. If a compromise has been validly made and acted upon it must be given effect to. In support of this contention reliance is placed on the following cases—*Nur Ali* v. *Imaman* (1), *Piare Lal* v. *Kokla Kunwar* (2), *Kokla* v. *Piare Lal* (3). The last two cases are really one case. The case in I.L.R., 35 All., was decided in Letters Patent appeal from the judgement of a single Judge of this Court between the same parties. The case of *Kokla* v. *Piare Lal* (3) is distinguishable from the present case. In that case the compromise was acted upon and on the faith of that compromise third parties had dealt with one of the parties to the compromise by purchasing the property from him. The rights of third parties had to be considered. The case of *Nur Ali* v. *Imaman* (1) is certainly in favour of the respondents. But with due deference to the learned Judges who decided that case I am unable to agree with them. They say that the compromise presented to the Revenue Court in that case was not in its essence "a compromise by deed but a statement in a petition to the revenue officer, informing him of the arrangement the parties had agreed upon and praying for mutation of names. And such a petition was clearly not such an instrument as is contemplated by section 17 of the Registration Act, but a document informing the revenue authority of the fact of such a compromise having been made." If the compromise filed before a Revenue Court is merely an intimation of the fact of a compromise already made and nothing more, then the question of the admissibility of the document is irrelevant. The document is then to be taken not as a compromise or an agreement between the parties that has

(1) Weekly Notes, 1884, p. 40. (2) (1913) 11 A.L.J., 107.

(3) (1913) I.L.R., 35 All., 502.

settled their respective rights in the property in dispute and the real compromise is that which was made before the presentation of the petition to the Revenue Officer. And if the real compromise was something else other than the document presented to the Revenue Court, then the compromise, if relating to immovable property of the value of more than Rs. 100 must be registered or it would not affect the property. In the present case the property is admittedly worth more than Rs. 100 and if the document of the 12th of February, 1901, was not the compromise, but an intimation of one that had already been entered into, the latter should have been in writing and registered. It is not pretended that any such document was executed by Musammat Jagrani and Mulai. I need hardly say that a compromise, oral or written, made in a Civil suit which is embodied in the decree, stands on a different footing. The rights of the parties are determined in that case by the Civil Court decree. An order by a Revenue Court in the mutation proceedings has no such effect. The jurisdiction of a Revenue Court decides in a mutation case summarily the question as to which of the two contending parties should be brought on the revenue papers for revenue purposes. The second contention for the respondents is that the compromise the mention of which is made in the document of the 12th of February, 1901, was a family arrangement, and such a document did not require registration, for a family arrangement does not necessarily imply alienation of property. It simply recognizes the antecedent title of one or of both the parties.

I would first observe that the plea of family arrangement was not taken in the written statement. In the latter it was distinctly stated that Musammat Jagrani had relinquished her claim to and right in the property in dispute (vide paragraph 10 of the written statement). Secondly all the members of the family who raised the plea in defence that Chandrika died joint with his brothers and their issue were not parties to the arrangement.

Thirdly part of the consideration agreed upon was to be paid to Musammat Jagrani which was never paid. Fourthly in the present case the arrangement did have the effect of alienation in the sense that Musammat Jagrani relinquished her right to the

1916

JAGRANI v. BISHESHAR DUBE.

sons that Musammat Jagrani relinquished her right to the property in favour of Mulu. The learned counsel for the respondents has relied on the case of *Khunni Lal v. Govind Krishna Narain* (1) but that case is no authority for the proposition that a document evidencing family settlement does not require registration.

I am therefore of opinion that the petition of compromise dated the 12th of February, 1901, is inadmissible in evidence for want of registration for the purpose of proving the relinquishment of her right to the property in suit by the plaintiff appellant.

I would allow the appeal subject to the payment of usufructuary mortgages of Chandrika and Musammat Amrani which have been found to have been paid off by the respondents or their father.

BY THE COURT.—The order of the Court is that the plaintiff will have a decree for possession conditional upon her paying the sum of Rs. 157-5-3, being the amount of the usufructuary mortgages dated the 8th *Sawan Sudi*, 1309, 1st *Jeth Sudi*, 1303 and 10th *Asadh Sudi*, 1287. The amount must be paid within six months from this date. If the amount is not paid the suit will be dismissed with costs in all courts. If the amount is paid within the time the plaintiff will have her costs in all courts.

Appeal decreed.

APPELLATE CIVIL.

1916

January, 17.

Before Mr. Justice Tudball and Mr. Justice Piggott

HARI KUNWAR (DEFENDANT) v. LAKHMI RAM JAIN AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (1908), *section* 104(*f*)—*Arbitration—Application to file an award made without the intervention of the court—Appeal—Duties of arbitrator.*

Held, that an appeal lies from an order directing the filing of an award in an arbitration made without the intervention of the court.

Held, further, that in an arbitration proceeding if the parties come to terms on a certain point it does not absolve the arbitrator from passing

* First Appeal, No. 137 of 1914 from an order of Bans Gopal, Subordinate Judge of Benares, dated the 8th of April, 1914.

(1) (1911) I. L. R., 33 All., 350.

judgement on that point incorporating the terms of the compromise in the award.

1916

HARI KUNWAR v. LAKSHMI RAM JAIN.

THE facts of this case were as follows :—

The parties were members of a joint Hindu family, the appellant being a widow of a deceased member of the family. Certain disputes having arisen between them, they appointed by a deed dated the 11th of October, 1911, three arbitrators (Pandit Chhannu Lal, Pandit Basti Ram Jha and Pandit Lakshmi Kant Pande). While the proceedings were pending one of the parties to the reference and one of the arbitrators Pandit Chhannu Lal died. Consequently a fresh agreement was executed on the 22nd of November, 1912, referring the matter to the two surviving arbitrators. According to the plaintiffs, one of the two arbitrators, Pandit Basti Ram, having refused to act as an arbitrator, the parties executed a third agreement appointing Pandit Lakshmi Kant Pande as the sole arbitrator. The arbitrator went into the questions in dispute very minutely and on the 31st of March, 1913, he made what has been called by the parties a preliminary award in which he noted the various claims made before him by the parties and after discussing them, he expressed his opinion as to how the property should be divided. This award was registered. Two of the defendants having raised certain objections to his conclusions he gave them a further hearing and on the 20th of April, 1913, he expressed in writing his opinion as regards those objections and then proceeded to make the final award which he delivered on the 21st of April, 1913, and got it registered. The plaintiffs then applied to the court to have the award filed in court and to make a decree in terms thereof. Notice having been issued two of the defendants, Harakhram Jain and Musammat Hari Kunwar, raised various objections alleging that the arbitrator had not decided some of the points which were referred to him and had not divided some property; had decided certain points which were not referred to him and had acted wrongly in making three awards; that the award was indefinite and incapable of execution and that the plaintiffs were guilty of fraudulently concealing the account-books. Musammat Hari Kunwar further alleged that she never executed the third agreement appointing Pandit Lakshmi Kant Pande the sole arbitrator.

1925

HARI KISHWAR v. LAXMI RAM JAIN

The learned Subordinate Judge having gone into the evidence produced by the parties came to the conclusion—

(1) that the Musammat executed the third agreement and appointed Pandit Lakshmi Kant as sole arbitrator;

(2) that the award was not indefinite and incapable of execution;

(3) that the award was not illegal and that the decision of the 21st of April, 1915, was the final award;

(4) that the arbitrator did not decide any point not referred to him;

(5) that the plaintiff neither misled nor deceived the arbitrator;

(6) that the arbitrator left no point undetermined inasmuch as—

(a) the parties had stated that they did not want to bid for Jaipur property and had dedicated it, so it was not necessary for the arbitrator to divide it,

(b) the parties similarly stated that they would arrange for Gaya Sradh and Brahman Bhojan according to their means and so the arbitrator was right in not deciding this point and

(c) that Musammat Hari Kunwar had clearly stated that she wished to live with Baburam Jain and so it was not necessary for the arbitrator to make a separate provision for her residence.

From this order two of the defendants, Harakhram Jain and Musammat Hari Kunwar, filed two separate appeals. This was an appeal by Musammat Hari Kunwar.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malaviya*), raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay from the order complained of. It was a decree passed according to section 21 (1) of the second schedule to the Civil Procedure Code and according to sub-clause (2) no appeal lies from such decree, except in so far as the decree is in excess of, or not in accordance with, the award. There being no such allegation here no appeal lies. An appeal, no doubt, lies under section 104(*f*) from an order filing or refusing to file an award, but once a decree has been passed in accordance with the judgement, no appeal lies.

1916

HARI KISHAN
v.
LAKSHMI RAM.

Munshi *Haribans Sahai*, for the appellant, contended that section 104(*f*) clearly gives a right of appeal and that right is not taken away by section 21 (2) of the second schedule. Moreover, section 21 (4) expressly lays down that the court shall order the award to be filed only where no ground such as is mentioned or referred to in paragraph 14 or 15 is proved, so if the appellants have proved any such ground the court should not have ordered the award to be filed, and this being an appeal from a judgement which according to the appellants is in contravention of the aforesaid section, an appeal would certainly lie.

[The Court overruled the preliminary objection and allowed the appellant to proceed with his arguments on the merits of the appeal.]

Munshi *Haribans Sahai*, for the appellant :—

The respondents had failed to prove that the Musammat knowingly executed the third agreement appointing Pandit Lakshmi Kant as the sole arbitrator. It was clear from the evidence on the record that she had signed a blank paper, she was accordingly not bound by any decision of the arbitrator. If, however, the court found that the Musammat had executed the agreement then the award was bad in law and could not be merged into a decree of the court because the arbitrator could make only one award according to law, and as soon as he gave his first award his powers ceased and he had no jurisdiction to make the subsequent awards. The so-called final award, however, was illegal and bad in law and liable to be set aside inasmuch as the award was indefinite and incapable of execution, as the arbitrator has in one place written 'third party' instead of 'second party' and as the arbitrator has in his award made the delivery of possession of a certain house conditional on the second party's paying to the first party a certain sum of money, and as in the operative part of the award he has said that the second party will not get possession of the house until the 'third party' pays to the first party certain sum of money, and as the 'third party' having no interest will never pay it, the second party can never get possession of the house. This may be a mere clerical mistake, but the award being a private one it cannot be amended or modified. Secondly the award was bad in law inasmuch as the

1916

HARI KUNWAR v. LAKHMI BAN JAIN.

arbitrator decided certain points which were not referred to him. In the first place he has made certain provisions for the marriage expenses of Data Ram Jaai and this was nowhere referred in the agreement. Secondly he has decided the question of inheritance of the Musammat's *stridhan* which was not referred to him for decision.

Lastly the award was bad because the arbitrator has not decided some of the important points which were expressly referred to him viz. :—

i The arbitrator has not divided the Jaipur property which was expressly included in the agreement and should have been divided.

ii. He has made no provision for Gaya Sradh and Brahman Bhojan expressly mentioned in the agreement, and

iii. He has not decided the question of Musammat's residence, one of the main questions raised by the Musammat in the agreement.

The award being thus indefinite, incapable of execution, illegal and bad in law no decree should have been passed in accordance therewith, and the decree that has been passed is liable to be set aside.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malviya*) for the respondent :—

The evidence of the arbitrator, against whose honesty nothing has been alleged, much less proved, and that of one of the respondents Sitig Ram read with the evidence of the Musammat herself, makes it clear that the Musammat did execute the last agreement. As regards the award itself, it was perfectly valid and has been rightly merged into a decree of the court. What has been called the preliminary award is a mere decision of the arbitrator of certain principles on which the property was to be divided and the second was merely a decision of certain objections raised by some of the parties. The real and the only award was the one which has been called the final award. Moreover, after the second decision, the parties themselves stated before the arbitrator that they had no more objections to urge and that he should proceed with the final division of the property. The next point urged by the other side was equally of no force inasmuch as the insertion

1916

HARI RON-WAR v. LAKHMI RAM JAIN

of the 'third party' for 'second party' was a mere clerical mistake and could not, and as a matter of fact did not, affect the award. The sums payable by one party to the other had been rightly adjusted at the end and there was no mistake. Then as regards the question of the arbitrator having decided some of the points not referred to him, it was submitted that the arbitrator had not exceeded his powers in deciding those points. By the agreement he was entitled to divide the property as he thought proper. Taking into consideration the fact that the marriage expenses of all the other members of the family had been met from the joint fund and that Dasa Ram was to be married while arbitration was going on, the arbitrator was perfectly within his rights in making some provision for it. Then as regards the inheritance of Musammat's *stridhan* property, the arbitrator stated in the award merely what is laid down in law, and as he was allowing the Musammat a lump sum in lieu of her maintenance, it was incumbent upon him to lay down her rights in the sum awarded as also to whom it was to go after her death. Then as regards the questions not decided by the arbitrator, it was submitted that those points were no longer at issue between the parties and so need not have been, and were rightly not decided. The first objection was about the Jaipur property. In a statement recorded by the arbitrator the parties had stated that they had dedicated the property to a certain idol and did not desire its division. After this the arbitrator could not divide it. The next objection was as to no provision having been made for Gaya Sradh and Brahman Bhojan. This was equally groundless because the parties had stated that each party would do it according to his means. The arbitrator therefore was justified in ignoring it. The last objection was that no provision had been made for Musammat's residence. The Musammat having stated that she was living with Rabi Ram Jani (one of the parties) and would also live in future with him, and Rabi Ram Jani having stated that he had no objection to it, it was not necessary for the arbitrator to decide it. Moreover, the Musammat in her statement expressly said that she wanted provision to be made for certain things in which she did not include this question of residence, this was therefore no longer a

1916

HARI KUN WAR v. LAKHMI RAN JAIN.

question at issue between the parties and need not have been decided. It was no doubt mentioned in the agreement but by not raising it before the arbitrator, it must be taken to have been waived. Any how this alone was not a sufficient ground for setting aside the award which had been accepted by the whole family excepting these two

Munshi *Harikans Sahai*, replied.

TUDBALL and PIGGOTT, JJ. :—These two appeals arise out of an application under paragraph 20 of the second schedule to the Code of Civil Procedure. They are heard together and this judgement will cover both appeals. The parties to this proceeding are a son of Gulab Ram Jani, eight grandsons of the same and the widow of a deceased son, Santokh Ram Jani. Disputes arose in the family and the members agreed to partition the property by means of arbitration. At the time of the first submission to arbitration in October, 1911, Adit Ram Jani, one of the sons of Gulab Ram Jani, was alive. An agreement was drawn up on the 11th of October, 1911, and signed by all. It set forth what the parties desired the arbitrators to do and the powers given. Three persons were appointed.

Before the latter were able to do anything, Adit Ram Jani and one of the arbitrators died. Therefore a fresh agreement was executed submitting the matter to the decision of the two remaining arbitrators. Then one of these refused to act and so a third agreement was drawn up on the 25th of September, 1912, and signed by all, submitting the matters to the decision of the third remaining arbitrator, Pandit Lakshmi Kant. This agreement contained a reference to the first agreement of October, 1911, and set forth that the arbitrator was to act under the conditions set forth in the latter.

An award was made on the 21st of April, 1913. The respondents, Lakhmi Ram Jani and his son Ganesh Ram Jani, then filed an application under paragraph 20 of the second schedule to the Code of Civil Procedure, that the award be filed and that a judgement and decree be passed in terms thereof.

1916

HARI KUNWAR v. LAKSHMI RAM JAISI.

Notice was issued to all the parties. Objections were filed by the appellants now before us. They were heard and decided, being disallowed, and the award was ordered to be filed. The court in the course of the same order passed judgement on the 8th of April, 1914, in accordance with the award and a decree followed in due course on the 28th of May, 1914. The present appeals are directed against the order of the court below that the award be filed.

A preliminary objection is taken that the appeal is incompetent in that a decree had been passed and there was no plea that it was in excess of, or not in accordance with, the award and therefore under paragraph 21, clause 2, no appeal can lie on any other ground.

In our opinion there is no force in this objection. The appellants are the 2nd and 5th parties to the submission to arbitration. The appeals, in both substance and form, are appeals against the order directing the award to be filed. Section 104(*f*) of the Code, in plain and clear terms, grants a right of appeal against an order filing an award in an arbitration without the intervention of the court. These appeals have been filed within the period allowed by law, and it is manifest that the bare fact that the court below has passed a judgement and a decree upon the award cannot take away the right of appeal from the order which the law allows.

The point is covered by the decision in *Khetra Nath Gangopadhyay* v. *Ushibala Dasi* (1). It is obvious that if the order of the court below filing the award be set aside, the judgement and decree based thereon must also fall to the ground; just as a final decree in a suit based on a preliminary decree falls, if on appeal the preliminary decree be set aside and the suit dismissed, *vide Kanhaya Lal* v. *Pirbeni Sahai* (2). We therefore disallow the preliminary objection.

Coming to the grounds of appeal, we note that they are the same in both appeals except that Musammat Hari Kunwar takes the additional plea that it is not proved that she executed the agreement dated the 12th of December, 1912, appointing Pandit Lakshmi Kant Pande sole arbitrator.

(1) (1914) 18 C.W.N., 931. (2) (1914) 12 A.L.J., 876.

1916

HARI KUNWAR v. LAKSHMI RAM JAIN.

On this point the court below has held against her and we fully agree with that decision

The two first agreements were drawn up in English and the third in Urdu. Admittedly, it bears the lady's signature, which followed the signatures of all the other parties to the submission. The lady swears that she had never agreed that Lakshmi Kant Pande alone should act as arbitrator and that the document was blank when she signed it, except for the signatures; that she was told it was to bear a document on it which would merely expedite the decision of the dispute, and she signed because the others had already signed.

Her allegation is disproved by the evidence of Pandit Lakshmi Kant and of the witness Sulig Ram. The latter is direct evidence of the execution by her, and the former shows that the arbitrator, when he examined her, and recorded her statement, was careful enough to ask her before hand if she had agreed to his acting as sole arbitrator. It is true that he made no record of her reply, but the witness is a man of good education and good position in life against whose honesty and honour not a word is said. He is a member of the bar in good practice at Benares, and we agree with the court below that his word is to be trusted It is urged that he wrote a letter to the second arbitrator on the 26th of December, 1912, asking him to come and join in the arbitration and that the court below wrongly refused to allow the appellant to prove this. This letter was put forward at a late stage of the proceeding in the court below and moreover was not put to the witness in cross-examination to enable him to admit and explain it or to deny it.

We hold that Musammat Hari Kunwar did execute the submission of the 25th of December, 1912, and that she willingly and knowingly did so.

The other grounds of appeal are—

(1) That the arbitrator made three separate awards and had no jurisdiction to do so, (2) that the award is so indefinite as to be incapable of execution, (3) that the award is bad in that the arbitrator has decided points not referred to him, and (4) that he has omitted to decide all the points referred to him.

1916

HARI KUNWAR v. LAKHMI RAM JAIN.

These are common to both appeals. It will be noticed that they raise points of the nature of grounds mentioned or referred to in paragraphs 14 and 15 of the second Schedule to the Code of Civil Procedure.

Paragraph 21 of that Schedule lays down that if any such grounds are not proved the court shall order the award to be filed. It is obvious that if any such ground is proved the court cannot order the filing of the award but must leave the parties to their remedy by a regular suit.

The power of the court to pass such an order is strictly limited by the terms of paragraph 21 of the Schedule.

We take the points *seriatim*.

(1) In regard to the so-called three awards we agree with the court below that there was only one award, viz. that of the 21st of April, 1913.

The arbitrator seems to have taken very great care and to have expended a great deal of trouble and time.

On the 31st of March, 1913, he drew up a long proceeding setting forth the principles on which he intended to base his award and partition the property and his reasons therefor. This he showed to the parties whereupon some of them filed objections. On the 20th of April, 1913, he drew up another long proceeding dealing with and disallowing these objections.

He then, on the 21st of April, 1913, drew up his award which is the award in the case. The other two documents are not awards in the true sense of the word and there is no force in this point. We reject it.

(2) The next is the plea of indefiniteness. This is based on a small clerical error apparent on the face of the award, but which does not in our opinion make the latter either indefinite or incapable of execution.

In dividing the family property the arbitrator allotted a certain house to the second party to the submission to arbitration. This was in the possession of the first party at the time. The arbitrator further ordered the second party to pay a certain sum of money to the first party within a fixed period.

He then laid down a further condition that possession of the house in question was not to be taken by the second party unless

1916

HARI KUNWAR v. LACHHMI RAM JAIN

and until the latter had paid the said sum of money to the first party. In writing down these conditions in his award he made a slip and wrote "unless the *third* party pays this sum to the first party they will not be entitled to take possession of the house." This was clearly only a slip, but the meaning of the word is clear. The house was allotted to the second party and the sum of money was ordered to be paid by that party to the first party who was in possession of the house.

There is no force in the appellant's contention.

(3) The next plea is that the award is bad in that the arbitrator decided points not referred to him.

This plea relates to two matters entered in the award.

The first is as follows:—Musammat Hari Kunwar is the widow of one of the deceased sons of Gulab Ram Jain, and as a Hindu widow in a joint family is entitled to rights of maintenance and residence in the family house. There was also a dispute as to her *stridhan*. In the agreement to submit to arbitration it was set forth that she was entitled to *stridhan*, maintenance and right of residence, and the arbitrator was authorized to decide as to all these as he pleased.

The arbitrator awarded to the lady a lump sum to cover her *stridhan* and her maintenance, giving to her full power to deal with it as she pleased during her life-time or by will. In other words he made her absolute owner thereof.

He then added that if she died intestate, leaving any portion of the sum, that balance would go to her husband's heirs in equal shares.

It is urged that he had no power to decide this question as to the inheritance of what she might thus leave on her dying intestate, as it was not a question in dispute.

In the first place what he has thus stated is apparently merely what the Hindu law lays down to be the law in case of this class of *stridhan*; and in the next place it is a matter which can be entirely separated without affecting the determination of any of the matters referred.

It was, however, we consider, merely an expression of the arbitrator's opinion as to the law which would govern the inheritance to the property if she were to die intestate.

1916

HARI KUNWAR v. LAKMI RAM JAIN

We do not think that there is any force in this contention. The second point relates to that part of the award where the arbitrator makes provision for the marriage expenses of Dalu Ram, one of the parties to the submission. It is urged that there was no reference on this point and there ought to have been no decision. With this we cannot agree. The arbitrator was given power to ascertain what was the divisible property of the family and to divide it up, as he thought best, among the members of the family. He saw that the marriage expenses of the other members of the family had been met, as is usual, out of the family income. He saw that Dalu Ram had not been married. He therefore thought it just when dividing the property to allot to Dalu Ram an extra sum to enable him to meet his marriage expenses. If he had given no reason for thus awarding this sum of money to Dalu Ram, his award could not have been touched. The bare fact that he gave his reason does not vitiate it, and he cannot be said to have decided a point not referred to him. We reject this plea also.

The fourth and last objection is that the arbitrator has failed to decide *all* the points referred. This plea is based on three points; (1) that he has failed to partition certain property at Jaipur, (2) that he has passed no award as to the expenses of the *Gaya Sradh* and *Brahman Bhojan*, and (3) that he has failed to decide as to the widow's (Musammat Hari Kunwar's) right of residence.

As to the first, the arbitrator's evidence shows that when in the course of his inquiry he came to the Jaipur property, the parties all informed him that it no longer belonged to them, as they had created a *waqf*, dedicating this property to a certain God. He therefore did not partition that which was not divisible. In the agreement the parties gave him power to ascertain the divisible property and to divide it. They clearly all stated that this was not divisible having been dedicated. His evidence is clear on the point and can be trusted. He therefore has not failed to do his duty in respect to this property.

(2) In regard to the expenses of the *Gaya Sradh* and *Brahman Bhojan*, these are expenses which had been met in the past out of the monies in the family chest. The arbitrator has retained

1916

HARI KUNWAR v. LACHMI RAM JAIN.

(and we believe him as the court below did) that the parties told him that he need pass no orders in respect to these as they would each separately spend what they could afford from time to time under these heads. Such expenditure is not fixed in amount. What a man spends under these heads depends on the length of his purse and his temperament. The parties having deliberately withdrawn the point cannot be now heard to say that there has been no decision thereon

(3) Lastly, we come to the question as to the widow's right of residence. Here unfortunately we come to what we are forced to hold is a flaw in the award

We have noted above that in the agreement executed by the parties it was distinctly laid down that the arbitrator was to decide as he pleased in regard to the widow's *stridhan*, maintenance and right of residence. The arbitrator's evidence shows that in the course of his inquiry he questioned Musammat Hari Kunwar. He asked her what she wished to be arranged for her benefit. She made many demands and in the course of her statement she said that she had always lived in the house, or that portion of the house, occupied by Babi Ram Jain, the father of the appellant Harakh Ram Jain, that she wished to live in that house-hold and would not live anywhere else. Babi Ram Jain was questioned as to her demands. He did not agree to at least one of them, but in regard to her wish to live with him he expressed a full consent. None of the other parties expressed any objection. Admittedly the award is silent on the point and does not give the widow a right of residence in any part of the family house, nor allot to her any sum as compensation in lieu thereof.

It is urged that the parties having come to an agreement on the point it was not necessary for the arbitrator to pass judgement on it and that there was a practical withdrawal of the point by the parties from his jurisdiction. With this it is impossible to agree. The fact that she asked for something and that Babi Ram acquiesced in her demand and no one else objected made the arbitrator's task simple; but it did not absolve him from passing judgement. When parties to a suit compromise, either the suit is withdrawn or a decree passed in terms of the compromise. There was no withdrawal in the present case but at the utmost a

statement by the parties giving the terms of a compromise. Where there is no specific withdrawal of the suit, the court must pass a decree in accordance with the compromise effected between the parties.

1916

HARI KISHAN v. LAKHMI DAS JAIN.

In our opinion the arbitrator ought in his award to have decided the question of the widow's right of residence and the manner in which it was to be satisfied.

As he has not done so, one of the matters referred has been left undetermined by the award and this being so, the court in view of the language of paragraph 21 of the second schedule, ought to have rejected the application made under paragraph 20.

We therefore allow the appeal and so set aside the lower court's order and reject the application. The appellant will have her costs in both courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

EMPEROR v. LAL BIHARI.*

1916 *March*, 20.

Criminal Procedure Code, section 110—Security to be of good behaviour—Appeal—Judgement.

A court of Criminal Appeal dismissing an appeal summarily is not bound to write a judgment, but an appeal from an order requiring a person to furnish security to be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged. And in such cases a District Magistrate should not dispose of an appeal otherwise than by a judgement showing on the face of it that he has applied his mind to a consideration of the evidence on the record, and of the pleas raised by the appellant, both in the court below and in his memorandum of appeal.

THE facts of this case were as follows:—

An order was passed against Lal Bihari and two others by a Magistrate of the first class under section 110 of the Code of Criminal Procedure. They appealed against this order to the District Magistrate of Basti, who dismissed their appeal by the following judgement:—"I see no reason for interference.

* Criminal Revision No. 791 of 1916, from an order of R. H. Williams, District Magistrate of Basti, dated the 30th of November, 1916.

1916

EMPEROR v. LAL BIHARI.

Appeal dismissed." Lal Bihari thereupon filed an application in revision to the High Court.

Mr. *T. N. Chadha*, for the applicants.

The Assistant Government Advocate (Mr *R. Malcomson*) for the Crown.

PIGGOTT, J.—A very similar case to this was recently before this Court, *vide Surtan* v. *Emperor* (1). The question of course is how far the procedure of a court of Criminal Appeal dismissing an appeal summarily can be held to be reasonably applicable to appeals under Chapter VIII of the Code of Criminal Procedure. I take it to be settled law that a court of Criminal Appeal dismissing an appeal summarily is not bound to give reasons. This Court has, however, always maintained a right to interfere, in the exercise of its discretion, where there was reason to suppose that the appeal had not received fair and adequate consideration. An appeal from an order requiring a person to furnish security to be of good behaviour is certainly distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence. I think that in a case like the present it is not unreasonable for this Court to insist that the District Magistrate should not dispose of an appeal of this nature otherwise than by a judgement showing on the face of it that he has applied his mind to a consideration of the evidence on the record, of the pleas raised by the appellant both in the court below and in his memorandum of appeal. At any rate I am not prepared to dissent from the view taken by a learned Judge of this Court in the case already referred to. I set aside the order of the District Magistrate dismissing the appeal of Lal Bihari in this case, and I direct that the said appeal be re-heard and tried according to law. I further transfer the hearing of this appeal from the court of the District Magistrate of Basti to that of the District Magistrate of Gorakhpur.

Re-hearing ordered.

(1) (1916) 14 A.L.J. 270.

Before Mr. Justice Piggott.

1916
April, 10

EMPEROR v. LAL SINGH *

Criminal Procedure Code, sections 403 and 413—One of several co-accused in the same trial sentenced to one month's imprisonment, others to a longer period —Appeal.

Held that the right of appeal exercisable by a person who has received an appealable sentence carries with it a right of appeal also by any other person convicted at the same trial, even though that particular person may have received a sentence which, if it stood alone, would not have been appealable.

THE facts of this case were as follows:—

On the 16th of November, 1915, a Magistrate of the first class convicted four persons on a charge framed under section 379 of the Indian Penal Code. Three of these accused he sentenced to undergo rigorous imprisonment for a period of three months each; but on one person, named Lal Singh, he passed a sentence of one month's rigorous imprisonment only. The three convicts who had received the longer sentence, a sentence in itself on the face of it appealable, exercised their right of appeal to the Sessions Judge. On the 3rd of December, 1915, the Sessions Judge quashed the convictions on the merits and ordered the release of the three convict appellants.

On the 13th of December, 1915, Lal Singh filed in the court of the Sessions Judge an application for revision against his conviction and sentence. This application was rejected, and he thereupon preferred the present application for revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

PIGGOTT, J.—The following are the essential facts out of which this application arises. On the 16th of November, 1915, a Magistrate of the first class convicted four persons on a charge framed under section 379 of the Indian Penal Code. Three of these accused he sentenced to undergo rigorous imprisonment for a period of three months each; but on one person, named Lal Singh, he passed a sentence of one month's rigorous imprisonment only. The three convicts who had received the longer sentence, a sentence in itself on the face of it appealable, exercised their

* Criminal Revision No. 133 of 1916, from an order of Babu Bihari Lal, Additional Sessions Judge of Meerut, dated the 14th of January, 1916.

1916

EMPEROR v. LAL SINGH.

right of appeal to the Sessions Judge. On the 3rd of December, 1915, the Sessions Judge quashed the convictions on the merits and ordered the release of the three convict appellants. Presumably information of the success of this appeal reached the convict Lal Singh and stirred him up to make an effort on his own behalf. It was not, however, till the 13th of December, 1915, that he managed to file in the court of the Sessions Judge a petition which on the face of it purports to be a petition of revision against his conviction and sentence. The Sessions Judge on the 14th of January, 1916, dismissed this application, giving as his reasons for doing so that it had been filed only three days before the expiry of the sentence passed upon Lal Singh and that the latter must be taken to have acquiesced in the sentence. He noted on the petition also that, the sentence having now been fully served, it did not appear that any adequate purpose would be served by invoking the interference of this court in the exercise of its revisional jurisdiction. Lal Singh now applies in revision to this Court against the order of the Sessions Judge. It seems clear from an inspection of the record that, if the Sessions Judge was right in acquitting the three co-accused, then Lal Singh was also entitled to an acquittal on the merits. Taking a broad view of the case, I might be content to dispose of it by saying that the applicant appears to be entitled in justice to an order of acquittal, and the fact of his having served his sentence does not necessarily in a case like the present make the interference of this Court futile. In view of the provisions of section 75 of the Indian Penal Code, to say nothing of other provisions of the law, it is a serious matter for an innocent man to have a conviction under section 379 of the Indian Penal Code, recorded against him and standing unreversed. I have really said enough to dispose of this application; but incidentally a question of considerable importance has been discussed in respect to which I think it worth while to record my opinion. The question is whether Lal Singh had or had not a right of appeal to the Sessions Judge against his conviction and sentence. I am of opinion that he had such a right of appeal. He certainly had unless the right conferred by section 408, Criminal Procedure Code, is taken away in respect of this accused by the subsequent section 413. That section is

1916

EMPEROR v. LAL SINGH.

intended to restrict the right of appeal by the exclusion of petty cases. The important words are those which provide that "there shall be no appeal by a convicted person in cases in which a court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only." It would have been easy for the Legislature to say that no appeal shall lie by a convicted person "upon whom or in whose case" such minor sentence has been passed. The wording of the section is certainly open to the interpretation that the Legislature intended that the right of appeal exercisable by a person who has received an appealable sentence should carry with it a right of appeal also by any other person convicted at the same trial, even though that particular person may have received a sentence which, if it stood alone, would not have been appealable. This view has been taken by the Judicial Commissioner's Court in Oudh, though there seems to be some authority to the contrary in the Bombay High Court. The question is clearly connected with one which has been raised as to the operation of proviso (*b*) to section 408, Criminal Procedure Code. I believe it now to be settled law in this Court that if an Assistant Sessions Judge, trying two or more persons jointly, passes in respect of one of those persons a sentence of imprisonment for a term exceeding four years, the appeal of all the persons convicted at the same trial will lie to the High Court, even though the sentence passed upon some of these persons is far below the limit laid down by the proviso. It is worth while to point out that a different interpretation of section 413, Criminal Procedure Code, would involve a certain anomaly which may best be illustrated by the facts of the present case. If the section in question were so interpreted as to deny to Lal Singh a right of appeal to the Sessions Judge, I think it would certainly have been the duty of the Sessions Judge, when he accepted the appeals of the three men convicted at the same trial, to have referred the case of Lal Singh at once to this Court in order that this Court might do justice in the exercise of its revisional jurisdiction. The interpretation which I would put upon section 413, Criminal Procedure Code, has therefore this advantage that it renders unnecessary the

1916

EMPEROR v. LAL SINGH.

interference of this Court in cases like the present. I think therefore that Lal Singh had a right of appeal to the court of Session against his conviction and sentence in the present case. From one point of view it is a circumstance against the admission of the present application, that the applicant had a remedy by way of appeal. On the other hand, there is this consideration in the applicant's favour, that he did present his petition to the Sessions Judge before his sentence had expired and within the period of limitation prescribed for the presentation of a criminal appeal. The Sessions Judge might therefore have dealt with that petition as an appeal and exercised his powers so as to give prompt relief.

For the reasons stated I am disposed to accept this application and I do so accordingly. I set aside the conviction and sentence in this case and record an order acquitting Lal Singh of the offence charged. As the sentence has been served there is no necessity to pass any further order.

Application allowed.

APPELLATE CIVIL.

1916

April 3

Before Mr. Justice Piggott and Mr. Justice Walsh.

UDHISHTER SINGH AND ANOTHER (DECREE-HOLDERS) v. KAUSILLA AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code (1908), *order XXXIV, rules 4 and 5—Mortgage—Preliminary decree in favour of puisne mortgagee allowing redemption of prior mortgage—Right of puisne mortgagee on redemption to a decree absolute for sale of the property comprised in both mortgages.*

In a suit for sale by puisne mortgagee the preliminary decree gave the plaintiffs a right to redeem a prior mortgage covering other property as well as that included in the mortgage in suit. The preliminary decree did not, however, specify that property as property which the mortgagees plaintiffs were entitled, in the event of non-payment, to bring to sale.

Held, that the plaintiffs, mortgagees, having paid the amount due on the prior mortgage, were entitled, notwithstanding this omission, to a final decree for sale of the property comprised in both mortgages.

THIS was a suit brought by the appellant for sale on a mortgage in his favour against the mortgagor as well as against a person named Tika Ram who held a prior mortgage over the properties

* Second Appeal No. 1344 of 1914, from a decree of H. E. Holmes, District Judge of Aligarh, dated the 28th of May, 1914, confirming a decree of Abdul Hasan, Assistant Judge of Aligarh, dated the 22nd of February, 1913.

1915

UDHISHTER SINGH v. KALELLA.

mortgaged to the appellant and also over certain other properties. On the same day this Tika Ram also brought a suit against the appellant and the mortgagor. Both the suits were tried together and preliminary decrees were passed on the 30th of November, 1910. In the appellants' suit the preliminary decree provided that in the event of the mortgagor not paying unto the appellant the amount found due on the mortgage in favour of the appellant, the appellant would be entitled to pay off the amount found due on the mortgage in favour of Tika Ram and thereupon he would be entitled to bring to sale the mortgaged property or a sufficient part thereof for the realization of the consolidated amount which should so become due to him. It appears that prior to the institution of the above mentioned suits Tika Ram had purchased the equity of redemption in all the mortgaged properties. Early in 1912, the appellant paid to Tika Ram whatever was found due on his mortgage. On the 17th of May 1912, he applied for a decree absolute under order XXXIV, rule 5, of the Code of Civil Procedure (1908), and prayed that the sale of not only the properties mortgaged to him but also of the additional properties mortgaged to Tika Ram be ordered. Tika Ram objected and thereupon the Subordinate Judge framed a decree absolute for the sale of only the properties mortgaged to the appellant.

On appeal the order and decree of the court of first instance were confirmed by the District Judge. The plaintiffs thereupon appealed to the High Court.

Munshi *Benode Behari*, for the appellant:—

Having paid off Tika Ram's mortgage the appellants have got the same rights as Tika Ram had over the properties mortgaged to him, or in other words they have been subrogated to the rights of Tika Ram. The mortgagor will not be in the least affected if the appellants be allowed to put to sale the additional properties mortgaged to Tika Ram. He had to pay off Tika Ram's dues and in default thereof all the properties mortgaged to Tika Ram would have been put to sale. As regards Tika Ram, he has got no equity in his favour, as he has got whatever was due to him and should not retain his hold upon the properties in question. The terms of the preliminary decree of

1915

UDHISTTER SINGH v. KAUSILLA.

the 30th of November, 1910, do not stand in our way. Our right to sell these additional properties did not arise from that decree but from the subsequent fact of our having paid off Tika Ram's mortgage. I rely upon an unreported judgement of GRIFFIN and CHAMIER, JJ., in the case of *Nawab Singh* v. *Tara Singh* (1). It is true that in that case there was this difference that the mortgagee had secured an amendment of the preliminary decree, but I submit that that does not make any difference; the principle adopted in that case would apply whether there was any amendment or not. I also rely upon *Gopi Narain Khanna* v *Bansidhar* (2). Moreover, section 74 of the Transfer of Property Act is also in my favour; and the cases *Gurdeo Singh* v *Chandrika Singh* and *Chandrika Singh* v. *Rash Behari Singh* (3), *Bisseshar Parshad* v. *Lala Sarnam Singh* (4), also support my contention. In the last mentioned case the principle of subrogation was fully discussed. In justice and equity I am entitled to have a decree for the sale also of the additional properties mortgaged to Tika Ram as I had to pay off Tika Ram's mortgage under the decree.

Babu *Piare Lal Banerji*, for the respondent:—

I do not contest the broader ground of subrogation. The true question is that, admitting that in equity the appellant would be entitled to have a right to bring to sale these additional properties, when should that right be claimed? He did not claim this relief in his plaint. In its decree the court has rightly or wrongly provided only for the sale of the properties mortgaged to the appellant for the consolidated amount and that decree still stands; as long as this preliminary decree stands it has to be made absolute as it is. Order XXXIV, rule 5, of the Code of Civil Procedure (1908), refers to rule 4 and that again refers back to rule 2 and from this rule we get what was meant by the expression "mortgaged property." A court making a decree absolute has got very limited powers. None of the cases cited on the other side bears on this point, excepting the unreported case, in which, however, an amendment had to be sought for. Such an amendment cannot be made at the present stage.

(1) S. A. No 450 of 1911, dated the 16th of December, 1912.
(2) (1905) 2 A. L. J., 336, 341.
(3) (1907) 5 C. L. J., 611, 631
(4) (1907) 6 C. L. J., 134, 137.

1916

DURGESHER SINGH v. KAUSILLA.

I rely upon the unreported judgement of BANERJI, J., in *Babu Kishen Lal* v. *Kishen Lal* (1). The error in the decree of the 30th of November, 1910, cannot be rectified at this stage. The other side will have to apply for a review. In his plaint the appellant prayed for a relief that he might be allowed to recover both the amounts, but did not pray that the consolidated amount should be made recoverable from the additional properties.

Under order XXXIV, rule 5 (2) of the Code of Civil Procedure, no option is left to the court but to pass a decree for the sale of the mortgaged property. Now where is the court to look to for a specification of the mortgaged property otherwise than to the preliminary decree? The court cannot go behind the preliminary decree. The court can amend its mistake in a proper proceeding in a proper way, that is to say, if so asked for. Moreover, it is not the case of the other side that the exercise of the powers of the court under sections 151 and 153 of the Code of Civil Procedure, are called for. They say that the preliminary decree was all right. At this stage they are asking the court to do something which the court cannot do. If they claim something other than what the preliminary decree had given them then they can bring a separate suit. It is not a case of an accidental error, but there is a clear and definite direction given in the decree. The appellant had to pay off Tika Ram according to the specific directions given in the decree and but for those directions he would have to bring a separate suit for the enforcement of his rights consequent upon that payment. The decree anticipated the consequences of that payment and provided for it and we cannot go beyond that. The appellant in the present proceedings wants the court to give effect to his compliance with the directions given in the decree and cannot seek a modification of the consequences of his compliance with those directions as the same had been anticipated beforehand and provided for in the decree.

PIGGOTT, J.—In the litigation out of which this second appeal arises there were three parties. The appellants now before this Court were subsequent mortgagees. There were certain

(1) Civil Revision No. 125 of 1912.

1916

UDHERINA SINGH v. KACHILA

defendants who were the original mortgagors, and there was one Tika Ram who held mortgages prior in date to those of the present appellants. There were separate suits instituted by Tika Ram and the present appellants, but we are concerned at present only with the suit in which these appellants were the plaintiffs. It was a contested matter between them and Tika Ram as to whether the mortgages in favour of the latter had or had not priority, but this point was decided in favour of Tika Ram. A preliminary decree was then drawn up under order XXXIV, rule 4, of the Code of Civil Procedure. The facts of the case were somewhat complicated, more particularly by the circumstance that the mortgages in favour of Tika Ram covered certain other property over and above that which was involved both in Tika Ram's mortgages and in the mortgages in favour of the appellants. The preliminary decree drawn up by the court of first instance was clumsily drafted. In substance, however, it contained the provisions prescribed by the Statute; the mortgagors were given an opportunity to pay off the plaintiffs, failing this the plaintiffs were given an opportunity of paying off Tika Ram, and in the event of plaintiffs doing so, they were to be allowed to bring the mortgaged property to sale. There was appended to the decree a specification of the property in suit, and of course the property involved in that particular suit was that covered by the mortgage in favour of the plaintiffs only, and did not include the additional property mortgaged to Tika Ram. In the result the mortgagors failed to redeem and the plaintiffs did pay off Tika Ram. They then came into Court asking for a final decree under the provisions of order XXXIV, rule 5, of the Code of Civil Procedure, and they naturally claimed that this final decree should be so drafted as to entitle them to bring to sale, not only the property originally covered by their mortgage, but the additional property included in the mortgages in favour of Tika Ram to whose rights they had been subrogated in consequence of the payment made by them subsequently to the passing of the preliminary decree. That this was a proper and valid claim has been practically conceded in argument before us, and is beyond question. Nor has it been questioned in the order passed by either of the courts below. The attitude

1916

UDHARCHAND SINGH v. KACHHLA.

taken up by the learned Subordinate Judge, who tried the suit in the first instance, and by the learned District Judge in appeal, is that the plaintiffs are asking the court to draw up a final decree for sale in terms inconsistent with the terms of the preliminary decree, and that this cannot be done. In fact a sort of *res judicata* is being set up against the present appellants. The contention is that they ought to have obtained in the preliminary decree itself a clear and specific statement that, in the event of their paying off Tika Ram, they would be entitled to bring to sale, not only the property covered by their mortgage, but the additional property already referred to. It is contended that they not only failed to do this, but they acquiesced in a decree which contained a specification of the mortgaged property, that this specification was limited in the manner already stated and that it cannot be added to or modified in any way in the decree absolute. Although these contentions have found favour in both the courts below, it seems to me that they have no real force. So far as the terms of order XXXIV, rule 5, are concerned these merely lay down that in a certain event the court shall pass a decree that "the mortgaged property or a sufficient part thereof" be sold. The meaning clearly is that the mortgaged property which the plaintiffs are under the particular circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither rule 4 nor rule 5 of Order XXXIV says anything about the specification of the mortgaged property. It is no doubt right and proper that the mortgage decree should contain such specification, but the question before us now is whether the court was debarred from making the correct specification in its final decree under order XXXIV, rule 5, by reason of anything it had done in the decree which it passed under order XXXIV, rule 4. The court which deals with an application for a final decree is still the same court of original jurisdiction to which the plaint in the suit was presented, and it is still seized of the entire suit. It is its duty to frame a proper final decree, determining correctly once and for all the respective rights and liabilities of the parties. No doubt it would be a questionable exercise of discretion for a court to pass a final decree in terms clearly inconsistent with those of the preliminary

1916

UDHISHTER SINGH v. KACHELA

decree; but so long as a court is seized of the entire case it seems to me that it is entitled to clear up any ambiguity existing in the preliminary decree, and I would go further and say that it is entitled to frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree. In the present case the preliminary decree simply directed that on a certain event "the mortgaged property" should be sold. The specification appended to the decree was simply that of the property mortgaged in the particular mortgage-deed on the basis of which the suit then before the court was brought. The question whether in the event of the then plaintiffs paying off Tika Ram, they would or would not become entitled to do something which they had no right to do under their own mortgage, namely, to sell the additional property mortgaged in favour of Tika Ram alone, had not been litigated before the court and I do not think it can fairly be said that it was determined by the form of the preliminary decree. I am of opinion that the court of first instance in the present case had jurisdiction, on the application made to it by the present appellants, to pass a final decree for sale in the terms desired by the appellants, and I am further of opinion that it ought to have done so. I would therefore allow this appeal with costs in all three courts, and direct that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale, not only the property originally mortgaged to them as specified in the preliminary decree, but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record.

WALSH, J.—I entirely agree in the result and with the reasons given by my learned brother. Mr *Banerji* on behalf of the respondents has argued this case with considerable skill, and the candour which might be expected from him. It is only because he has been able to present such formidable arguments, and because two courts have deliberately decided in favour of the view for which he has contended, that I think it desirable to say something in addition to my brother PIGGOTT'S reason for allowing this appeal, upon some broader and more important

1916

UDRIBHAN SINGH v. KACHHIA

considerations which to my mind are raised I think it is high time that the attention of the lower courts was again drawn to the powers conferred on them by sections 151, 152 and 153 of the Code of Civil Procedure. Those sections are just as applicable to courts of first instance as to courts exercising appellate jurisdiction. Without enlarging upon their scope, it is sufficient to say that the powers conferred upon all courts exercising jurisdiction under the Code by those sections are wide, salutary and intended to enable the court, by curing breaches of technical rules, to give effect to the real rights of the parties and to prevent multiplicity of suits. I quite agree with what Mr. *Banerji* has said, that a mere attempt by a court to do what it is pleased to think "justice between man and man" without regard to form at all, is just as likely to produce a miscarriage of justice as a slavish adherence to rules of procedure, and it is obviously difficult to define by a general proposition the dividing line between form and substance. But in this particular case there is no difficulty. It was admitted by Mr. *Banerji* that by law the appellants in this case were entitled to be subrogated, in respect of this surplus piece of property which is in dispute, to the rights of Tika Ram. Not only so, but it was also admitted by him with equal candour that unless in some way or other they could assert and obtain recognition of those admitted rights in the proceeding now before us, they would be confronted, in an independent suit brought in order to assert them, by a plea of *res judicata*. In other words, the effect of the order of the court below, which we are asked to affirm, was so to hold a party to the *t's* which he has crossed and the *i's* which he has dotted as to deprive him of his actual rights admitted by the party opposed to him in the suit. It is in such cases that a court is not only entitled, but in my judgement, is bound to brush aside a mere technicality which stands in the way of justice, and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties. I will cite in support of the view I hold in this matter what has been laid down and recognized for years in the courts in England. The provisions of the English law are to be found in order XXVIII of the rules of the Supreme Court,

1916

UDHISHTER SINGH v. KATHELIA.

which correspond roughly with the first schedule of the Code of Civil Procedure, and in sub-section 7 of section 24 of the Judicature Act of 1873. The recognized principles upon which those provisions have been administered are contained in the sentences which I am going to quote from judgements of recognized authority in the English Court of Appeal at different epochs. "My practice," said Lord BRAMWELL, "has always been to give leave to amend unless I have been satisfied, that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission," said Lord ESHER, "and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." "An amendment ought to be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided." Again the Court of Appeal has said that under these provisions every Judge has full power of his own motion (that means to say when he sees that the party himself has not recognized the amendment which is necessary, but that amendment is desirable) to make any amendment which he deems necessary for the purpose of determining the real question at issue between the parties. I do not myself profess to have followed very closely what possible alternative might have been suggested to the courts below for the purpose of correcting what was not so much an omission, as a want of foresight in the original drawing up of the provisional decree. It must be borne in mind that in drawing up such orders as this, the priority of the mortgages in question, the contingency to arise in the event of the first mortgage being paid off either by the mortgagor or the subsequent mortgagee, and a variety of other details, have to be considered and worked out, and judges, officials and counsel themselves would be more than human if mistakes were not made by even the most highly qualified person entrusted to carry out the work. It is of the highest importance for the administration of justice that when the real rights of the parties

are clear and definite, as in this case they are admitted to be, the Court of its own motion, without waiting for any application to be put in by a party, should adopt the necessary course to give effect to such admitted rights. It is for that reason that I have not referred to section 114 of the Code of Civil Procedure, which gives the power of review. That is also a salutary provision, but having regard to the provisions relating to the procedure contained in order XLVII, it imposes upon a party who is suffering from a mistake the task of taking some fresh independent steps of a technical nature which may lead to some unforeseen difficulty. I think myself that the powers under the sections already referred to are sufficient for a court, and that they should be kept in mind by the lower courts when such controversies arise as have arisen in this matter. It only needs to be added that in all such cases where it is clear to an appellate court that it was open to the first court or any lower court to have taken such steps by way of amendment, the appellate court ought to do what the lower court might have done.

1916

UDHISHTAR SINGH v. MACHELLA.

BY THE COURT.—The appeal is allowed with costs in all three courts and it is ordered that a decree for sale be drawn up in the terms desired by the plaintiffs authorizing them to bring to sale not only the property originally mortgaged to them as specified in the preliminary decree but also the additional property covered by the mortgage or mortgages in favour of Tika Ram alone, the specification of which can readily be ascertained from the papers on the record

Appeal decreed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SURAJ BHAN AND OTHERS (DECREE-HOLDERS) v. HOOT AND EQUIPMENT FACTORY, AGRA (JUDGMENT-DEBTOR.)*

1916 July 5.

Act No VII of 1909 (Indian Companies Act), section 187—Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction.

A decree had been obtained against a company which subsequent to the passing of the decree went into voluntary liquidation. The decree-holder applied for execution of the decree which was granted by the court of first

* Second Appeal No. 1027 of 1915, from a decree of D. R. Lyle, District Judge of Agra, dated the 20th of April, 1915, reversing a decree of Abdul Ali, Subordinate Judge of Agra, dated the 15th of February, 1915.

1915

SURAJ BHAN v. BOOT AND EQUIPMENT FACTORY, AGRA.

instance. On appeal the District Judge ordered stay of execution. *Held* that the District Judge had no jurisdiction to stay execution. Under the Indian Companies Act the only court that could stay execution was the High Court.

Held further that section 207 of the Indian Companies Act is no bar by itself to the progress of execution unless and until an order has been obtained from a court having jurisdiction under the Companies Act, either for winding up or for stay of proceedings.

THE facts of the case are as follows :—

One Seth Suraj Bhan held a decree against the Boot and Equipment Factory Company, Limited, Agra, a company which was started in 1907, with a nominal capital of Rs 5 lakhs, divided into 20,000 shares of Rs. 25 each. The registered office of the Company was at Agra, but it was transferred to Calcutta in 1914. The Company resolved voluntarily to be wound up at a special meeting on the 11th of February, 1914, and at a subsequent meeting the resolution was confirmed. Seth Suraj Bhan put his decree into execution and certain properties of the Company were attached. The Subordinate Judge allowed execution to proceed. The liquidator of the Company appealed against that order on the ground that as the Company had gone into voluntary liquidation, the decree held by Seth Suraj Bhan could not be executed by the sale of the attached properties. A cross objection had been filed to the effect that the Company had not properly gone into liquidation and that the liquidator had not been duly appointed, and that the Company had no power to transfer its registered office from Agra to Calcutta. The District Judge of Agra allowed the liquidator's appeal and struck off the execution case. The decree-holder appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant :—

The Judge has struck off the execution case on the sole ground that the Company has gone into voluntary liquidation. The Judge has held that the property vests in the non-official liquidator, but there is no statutory provision on the point. The Calcutta High Court has taken the opposite view in the case of *Amrita Lal Kundu* v. *Anukul Chandra Das* (1). My contention is that when we have a decree and apply for execution it is for the judgement-debtor to show that we cannot execute it. In a case of this nature the only court

(1) (1915) 20 C. W. N., 385.

1916

SUGAR LOAN & LOAN AND EQUIPMENT FACTORY, AGRA.

which has jurisdiction to arrest execution is the High Court. Moreover, the head office of the Company having been transferred to Calcutta it is the Calcutta High Court that can stay execution.

Babu *Piare Nath Banerji* (for Babu *Lalit Mohan Banerji*) for the respondent :—

I concede that the transfer of the head office to Calcutta, is illegal. But that does not make the winding-up resolution illegal nor is the appointment of the present liquidator illegal. I submit that there is nothing in the law to make a meeting in Calcutta, illegal when the head office is at Agra. When it is conceded that the appointment of the liquidator is legal, then section 207 of the Indian Companies Act applies and the liquidator has to pay up all the creditors *pari passu*. If execution is allowed to proceed the result would be that this particular creditor would get an unfair advantage over the other creditors and section 207 will be nugatory. If a creditor is not satisfied with what the liquidator is doing he can apply under section 219 or section 215 of the Indian Companies Act.

Babu *Piari Lal Banerji* was not heard in reply.

PIGGOTT, J.—This is an appeal by the decree-holders in an execution case. The judgement-debtor is a company registered under the Indian Companies Act (Act VII of 1913). For purposes of this appeal we may take it that this Company has gone into voluntary liquidation. The court of first instance held that this circumstance afforded no reason for staying execution of the decree; but this decision has been reversed by the District Judge on appeal. In the Indian Companies Act (No. VII of 1913), there is no statutory provision as to stay of suits or other legal proceedings in the case of a company which has gone into voluntary liquidation, corresponding to the provisions of section 171 of the Act, with regard to the consequences of a winding up order. The learned District Judge points out that it would be open to the present decree-holders to obtain a winding-up order and assumes that this circumstance is in itself sufficient to deprive them of their remedy by way of execution. We have been referred to the provisions of section 297, clause (1), of the Act. It is there

1916

SURAJ BHAN v. BOOT AND EQUIPMENT FACTORY, AGRA

laid down that one of the consequences which ensues on the voluntary winding up of a company is that its assets shall be applied in satisfaction of all its liabilities *pari passu*. These words lay down a direction for the guidance of the liquidator and confer certain rights on all the creditors. The question, however, is on whom does the burden lie under the circumstances now before us of moving the court which has jurisdiction under the Indian Companies Act, to take action with a view to enforcing these provisions? Undoubtedly the liquidator, or any other creditor dissatisfied with the action taken by the present decree-holders, would be entitled to move the court having jurisdiction under the Companies Act; but the mere existence of this provision in section 207, clause (1), does not seem to operate in itself as a statutory bar to the progress of the execution proceedings, unless and until an order has been obtained from a court having jurisdiction under the Companies Act, either for winding up, or for stay of proceedings. The practical importance of the above considerations seems to be illustrated by the facts of the present case. The debtor company purports to have gone into voluntary liquidation, and it has at the same time taken certain steps, the object of which would seem to be, to leave it doubtful whether the court which would have jurisdiction over the affairs of this particular company under section 3 of Act VII of 1913, should be this Court or the Calcutta High Court. In argument it was conceded before us that this Court would have jurisdiction; but there has been no formal application to this Court by the liquidator or by any other person concerned in the affairs of this Company, which would have the effect of binding such applicants to an admission that this Court was the proper court to exercise jurisdiction. It seems to me therefore under the circumstances that the proper order to pass is one setting aside the order of the District Judge and returning the execution case to the court of first instance, with directions to proceed with the execution, unless and until those proceedings are brought to a close by a winding-up order, or by some order of a competent court exercising jurisdiction under Act No. VII of 1913.

WALSH, J.—I agree. I think the judgement of the District Judge wholly missed the point. There is an express stay in

the case of a compulsory winding-up order. That is obviously to prevent a conflict between two courts in two distinct proceedings dealing with the same subject matter. But in spite of the stay provided by section 171, leave of the court may still be obtained under it on certain terms to continue legal proceedings. That shows that whether a proceeding is to be allowed to continue or not is a matter for the consideration of the court having jurisdiction over winding-up. If the decision of the learned District Judge were to stand, the result would be to give to the district court, or the court from which the decree was obtained, jurisdiction to determine questions arising in a winding-up which the Legislature has entrusted to the court of the place where the company has its registered office. To my mind in a voluntary winding-up before the company itself can obtain a stay it must apply to the court in which the winding-up would take place if it were compulsory. That is obviously the appropriate court to determine any question between the company or its liquidator and any other person.

1918

SUBAL BRAM v. BOOT AND EQUIPMENT FACTORY, AGRA

BY THE COURT.—The appeal is allowed, the decree of the lower appellate court is set aside and the execution proceedings are remanded to the court of first instance, through the lower appellate court, to be proceeded with subject to the remarks contained in the order of the Court. The appellants will get their costs in all three courts.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice and Justice, Sir Pramada Charan Banerji.

1918

April, 10

KUNWAR SEN AND OTHERS (PLAINTIFFS) v. DARBARI LAL AND OTHERS (DEFENDANTS)*.

Mortgage—Mortgagee in possession—Equity of redemption—Adverse possession while period of redemption is running—Suit to redeem by a person whose name is recorded in revenue papers.

Held that a person could not acquire a title, by adverse possession, to land which was the subject of a usufructuary mortgage, and therefore in the possession of the mortgagee, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the

* Second Appeal No. 1355 of 1914, from a decree of G. C. Badhwar, District Judge of Mainpuri, dated the 15th of August, 1914, confirming a decree of Ladli Prasad, Subordinate Judge of Mainpuri, dated the 27th of September, 1913.

1916

KUNWAR SEN v. DANDARI LAL.

mortgaged property. *Lala Kanhoo Lal* v. *Musammat Manki Bibi* (1), not followed. *Carlona* v. *Scarfe* (2), distinguished.

THE facts of this case were as follows :—

By a mortgage-deed, dated the 17th of July, 1874, one Dulha Rai mortgaged his zamindari property with possession to one Girdhari Lal on condition that the mortgagee was to pay the Government Revenue, and Rs. 24 to the mortgagor as *malikana* every year, and take the rest of the profits in lieu of interest. The mortgagee entered into possession under the mortgage, but never paid *malikana* to the mortgagor or his heirs or any body else. The plaintiffs instituted the present suit for redemption on the allegation that their ancestor was the real mortgagor and Dulha Rai was a mere *benamidar*, and that in any case they had been in adverse possession of the equity of redemption ever since the death of Dulha Rai to the exclusion of the true heirs of Dulha Rai, and were entitled to redeem. It was proved that on the death of Dulha Rai, the names of the plaintiffs were recorded in spite of the objections of the real heirs of Dulha Rai, in the Revenue papers as mortgagors in 1880, and were so recorded up to the date of the institution of the suit. The entry in the *khewat* was also attested by the mortgagee. The plaintiffs also alleged that they had been realizing "*sair*" and "*sewai*" income and *Nazrana* had also been paid to them. Both the courts below held that Dulha Rai was the real mortgagor, and that under the circumstances the equity of redemption could not be acquired by adverse possession, and dismissed the suit. The plaintiffs appealed.

Babu *Preo Nath Banerji* (with him Dr *Surendra Nath Sen*, and Babu *Yatish Chandra*), for the appellants :—

An equity of redemption can like any other equitable estate, be extinguished by the operation of the statute of limitation, and acquired by a stranger by adverse possession. The fact that the mortgage was a usufructuary one makes no difference in principle ; *Lala Kanhoo Lal* v. *Musammat Manki Bibi*, (1) and S. A. No. 362 of 1913, decided on the 11th of July, 1914. In the present case the plaintiffs had been successfully asserting their title to the equity of redemption,

(1) (1901) 6 C. W. N., 601. (2) (1737) 1 Atk., 602.

1916

KUNWAR SEN v. DARBARI LAL.

to the exclusion of the rightful heirs, ever since 1880, and their title as mortgagors had been admitted by the defendant mortgagee. The latter should not now be allowed to deny the plaintiffs' title and right to redeem. The plaintiffs had exercised all rights of ownership of the equity of redemption which under the circumstances were open to them. He referred also to section 28 of the Limitation Act.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent, was not called upon to reply.

RICHARDS, C.J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiffs sought to redeem a mortgage, dated the 17th of July, 1874. The mortgage was made by one Dulha Rai. The plaintiffs alleged that their ancestor (what ancestor they do not say) was the real owner and that it was only on account of private arrangements that Dulha Rai made the mortgage instead of the ancestor. They then go on to claim that only a small sum is now due on the mortgage, but they are willing to pay whatever the court finds to be due and so redeem the property. The court of first instance, after calling attention to the very vague way in which the plaintiffs alleged their right, held that the plaintiffs had not proved that they had any connection with Dulha Rai, or that their ancestor was the owner of the property. The plaintiffs had alleged and produced some evidence to show that they had been in receipt of certain *sewai* income. They also proved, (which apparently is the fact), that sometime after the death of Dulha Rai they or their ancestor succeeded in having the name of the widow of Dulha Rai removed from the revenue papers and their own names recorded, also that they successfully resisted an attempt of the heirs of Dulha Rai to have this record changed in the year 1902. The plaintiffs' witnesses went so far as to swear that the plaintiffs had been receiving Rs. 24 annually from the mortgagee. This allegation was quite contrary to the allegation in the third paragraph of the plaint in which the plaintiffs say that this sum of Rs. 24 a year had never been paid or realised. The first court found that the allegation of the plaintiffs that *sewai* income had been received was untrue. On appeal the plaintiffs contended that even on the assumption that they had failed to prove that Dulha Rai represented

1916

KUNWAR SEN v. DARBARI LAL

their ancestor, they had nevertheless (by the evidence they produced) proved that they had been in "adverse possession" of the equity of redemption. They based this contention on the proved fact that they and their ancestors had succeeded in having their names entered in the manner we have stated and on the further allegation, (which is probably quite untrue), that they had received the *sewai* income. In this connection we may mention that whether they received the *sewai* income or not, is of very small importance because under the terms of the mortgage (whether Dulha Rai was the real mortgagor or not), the mortgagor during the continuance of the mortgage was not entitled to the *sewai* income. The only reservation in the mortgage was Rs. 24 *maikana* allowance, which according to the plaintiffs' own admission was never paid or realised. The lower appellate court held against the plaintiffs. The learned Judge says that there might have been something in the plaintiffs' contention had that been their original case, but goes on to hold that it was no part of their original case. The learned Judge dismissed the appeal. In Second Appeal to this Court it was contended that the plaintiffs did foreshadow, at least, in their plaint the case of adverse possession of the equity of redemption, that evidence was on the record and the defendants could not be said to have been taken by surprise, and that accordingly the court ought to have considered this contention and to have decided in favour of the plaintiffs, if they were so entitled. Accepting this stand point, the question we have to decide is whether or not the plaintiffs can be said to have been in "adverse possession" of the equity of redemption. In other words, whether the right of Dulha Rai and his heirs has by adverse possession vested in the plaintiffs. For the reasons already stated we may disregard altogether the allegation of the receipt of *sewai* income. There remains only the fact that the plaintiffs succeeded in getting their names recorded in the way we have mentioned. It seems to us that this fact could never confer a title on the plaintiffs. We have great difficulty in seeing how a person could be said to be in "adverse possession" of the right to redeem immovable property where the right to possession and actual possession is all the time in the hands of the mortgagee. Article 144 of the

1916

KUNWAR SEN v. DARBARI LAL.

Limitation Act provides that a suit for possession of immovable property, or any interest therein, is to be brought within twelve years of the time, when possession of the defendant becomes adverse to the plaintiff. If we assume that Dalha Rai and his heirs were all along entitled to possession of this property subject to the possessory mortgage of the defendants, it is quite clear that so long as the mortgage subsisted, they could never have brought a suit *for possession* against the plaintiff. The mere fact that the plaintiffs had been asserting a title adverse to them would not have entitled the plaintiffs to bring a suit *for possession*. True it is that they might have brought a suit for a declaration of their title but they were not bound to do so. A person cannot be said to be in "adverse possession" against the owner where the former is neither in actual possession nor in constructive possession by receipt of the rents and profits. Reliance is placed upon a judgement of the Calcutta High Court in the case of *Lala Kanhoo Lal* v. *Musammat Manki Bibi* (1). This case no doubt is to some extent in favour of the plaintiffs. A number of authorities were referred to including the case of *Casborne* v. *Scarfe* (2), and the judgement of Lord HARDWICKE is quoted. Lord HARDWICKE, no doubt, pointed out in that case that an equitable estate might be barred by time just as much as a legal estate, and he there refers to and describes an equity of redemption. It must be borne in mind, however, that the equity of redemption where the possession remains with the mortgagor is quite different from the equity of redemption where the possession is with the mortgagee. There can be no doubt that an equitable estate, as distinguished from a legal estate, can be barred by time; but it seems to us impossible that any person can be in possession of the right to redeem a mortgage where, under the terms of the mortgage, the mortgagee is entitled to the actual possession, and is in fact in possession thereunder. We think that the view taken by the court below was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1904) 8 C. W. N., 601. ( ) (1737) 1 Atk., 603

1916
April, 12.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

RAM CHARAN LAL (PLAINTIFF) *v.* RAHIM BAKSH (DEFENDANT).*

Hindu Law—Mitakshara—Succession—Bandhu—Mother's brother's son preferred to mother's sister's son.

According to Hindu law of the Mitakshara school, the mother's brother's son takes precedence as an heir over the mother's sister's son *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1), dissented from *Buddha Singh* v. *Lalta Singh* (2), referred to.

THIS appeal arose out of a suit for the possession of a 9/20ths share in certain properties which originally belonged to one Hori Lal, who died childless many years ago. He was succeeded by his mother, Musammat Jhummun, who died about seven years ago. The plaintiff's case was that on the death of Musammat Jhummun, as there were no nearer relations alive, the estate was inherited by Kalyan Rai, Birbal, Maidai Lal, Mithan Lal and Jiwan Sahai, who were the sons of the maternal uncles (mother's brothers) of Hori Lal; that three of these persons viz. Maidai Lal, Mithan Lal and Jiwan Sahai subsequently sold to the plaintiff 3/4ths of their share in 9/20ths of the whole property and that the defendants were trespassers in possession; hence this suit for possession of the 9/20ths share and mesne profits. The defence, *inter alia*, was that after the death of Musammat Jhummun the estate was inherited by one Narain Das, the son of the sister of the mother of Hori Lal; that under the *Mitakshara* a mother's sister's son is a preferable heir to a mother's brother's son. Consequently the plaintiff's vendor, not having any title, could not transfer any title to the plaintiffs.

The court of first instance decreed the suit, holding that the mother's brother's son was a preferable heir to a mother's sister's son.

The defendants thereupon preferred separate appeals which were heard together and the appellate court held that the mother's sister's son was the preferable heir and following the decision in *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1), dismissed the suit.

* Second Appeal No. 1360 of 1914, from a decree of V. N. Mehta, District Judge of Bareilly, dated the 30th of July, 1914, reversing a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 16th of December, 1913.

(1) (1909) I. L. R., 33 Mad., 433. (2) (1915) I. L. R., 37 All., 504.

Babu *Sital Prasad Ghose*, for the appellant:—

Both the mother's brother's son and the mother's sister's son are *atma bandhus*. The *Mitakshara* only prescribes that the *atma bandhus* would come before the *pitri bandhus* who in their turn come before the *matri bandhus*. *Mitakshara*, Chapter II, section 6, paragraph 102. The *Mitakshara* does not prescribe any order of succession *inter se* between the different members of each of the different classes. The order given in the text is only for the exigencies of the *metre*. If the mother's brother's son be placed next to the father's sister's son then there would be one letter more in the first line and one letter less in the second than what the *metre* would require. The ruling in *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1), is based upon Smriti Chandrika which is an authority in Southern India but not here. It was a case between Jains. In the case of a mother's sister's son two females intervene, whereas in the case of a mother's brother's son only one female intervenes and therefore the latter is to be preferred; *Tirumala Chariyar* v. *Andal Ammal* (2).

I rely upon the observations of BANERJI, J., in *Subo Singh* v. *Sarfaraz Kuar* (3). The test imposed by the Privy Council in *Buddha Singh* v. *Lalta Singh* (4), is that when consanguinities are equal, he who confers the greater spiritual benefit is to be preferred. Although the mother's brother's son offers only two full *pindas* whereas the mother's sister's son offers three full *pindas* to the ancestors to whom the propositus was bound to offer *pindas* in his paternal line, which are of superior benefit, he is to be preferred. On the ground of superior spiritual benefit the *Dayabhaga* has preferred the mother's brother's son. Moreover, the mother's brother's son offers *pinda lepas* to three higher ancestors in his paternal line; Ram Krishna's Hindu Law, Vol. II, p. 182. Further, by giving the property to the mother's brother's son you perpetuate the offering of oblations in his son, grandson and so on. Not so in the case of the mother's sister's son as his sons, grandsons, etc., do not offer any *pindas* to the ancestors of the propositus. Reliance was placed upon *Mayne's* Hindu Law, 8th edition, pages 713, (paragraph 512), 714 (footnote).

(1) (1903) I. L. R. 33 Mad. 472. (3) (1893) I. L. R., 19 All., 216 (220).
(2) (1905) I. L. R. 30 Mad. 45. (4) (1915) I. L. R. 37 All., 604 (613).

1916

RAM CHARAN LAL v. RAHIM BAKSH.

810, 811 (chart) and 812; *Trevelyan's* Hindu Law of Inheritance, p. 42, 386; *Sarvadhicary's* Hindu Law of Inheritance, pages 698, 700 and 701; *Tirumalu Chariyar* v. *Andal Ammal* (1).

The Hon'ble Munshi *Gokul Prasad* (with him Munshi *Harnandan Prasad*), for the respondents:—

The conferring of funeral oblations will be one criterion. Now on that basis Hori Lal himself cannot give *pindas* to any ancestor beyond the grandfather of his own maternal grandfather. So we are not to go beyond that ancestor. The mother's sister's son will offer the same kind of full *pindas* to the same maternal ancestors as the propositus would have done. They both offer three full *pindas* whereas the mother's brother's son will offer only two full *pindas* and a divided *pinda* to these ancestors. Divided oblations are of less benefit than full oblation; *Sarvadhicary's* Hindu Law of Inheritance, pages 648—650; *Ram Chander Martand Waikar* v. *Vinayek Venkatesh Kothekar* (2). *Lopas* offered to the ancestors beyond the grandfather of the maternal grandfather does not confer any benefit on the propositus; J. C. *Ghose's* Hindu Law, page 182. As to the capacity of the sons, grandsons etc., of the mother's brother's son to offer *pindas*, one must look to the present state of affairs and not to a future possibility. Turning now to the text of the *Mitakshara*, we find that the same order is maintained in the case of *pitri bandhus* and *matri bandhus*. This is not by mere accident and this is significant. If we put the maternal uncle's son first and the two others afterwards then the motive would not be changed if we transpose the line. Balam Bhatta in his *Subodhini* says that the order is to be maintained. This is also the order given in Vyavahara Mayukha, a commentary on *Mitakshara*; *Mandlik's* Translation, page 82. Ordinarily under the *Mitakshara* the succession opens out according to the enumeration; why should it not be in the case of *bandhu*? The father's sister's son offers three full cakes to three paternal ancestors of the propositus and hence comes first, then comes the mother's sister's son who offers three full cakes to the maternal ancestors of the deceased and the mother's brother's son who offers only two full cakes will come last. Unless there is a rule

(1) (1915) I. L. R., 39 M., 493. (2) (1915) I. R. L., 47 Calc., 364, 406.

1916

RAM CHARAN LAL v. KESHU BAIDH.

that the order should not be followed it should not be departed from; *Kishori Lal Sarcar's Tagore Law Lectures*, page 154. The mother's brother is introduced by the *Viramitrodaya*. He will come after the mother's sister's son. The principle of the exclusion of the female line ought not to be followed in cognatic succession It that be so several *pitri bandhus* would come before the *atma bandhus*. There is no warrant in the Hindu Law for the proposition laid down in *Tirumala Chariyar* v. *Andal Ammal* (1), *Trevelyan's* Hindu Law, page 330. Propinquity being the same the mother's sister's son has got preference inasmuch as he confers greater spiritual benefit.

Babu *Sital Prasad Ghose*, in reply :—

The enumeration of *bandhus* given in the *Mitakshara* is not an exhaustive one as held by the Privy Council in 12 M. I. A., 448 Several persons who are admittedly *bandhus* do not find places there, the maternal uncle is one of these. The order given in all the three classes viz. *atma bandhus*, *pitri bandhus* and *matri bandhus* is similar for the sake of symmetry, euphony and also for the sake of metre. Further, this order is due to association of ideas and the father's son is juxtaposed with the mother's sister's son. The transposition of the line will detract from the euphony. Hence there is no special virtue in the fact that the same order is maintained in all the three classes. The governing principle of the *Mitakshara* is that the female line is excluded by the male line. On that principle the cognate in whose case two females intervene ought to be excluded by him in whose case only one female intervenes. As for the postponement of *pitri bandhus* who ought on this hypothesis alone to have come earlier than certain *atma bandhus*, is due to express wordings of the texts Note the place where the word *kram* occurs in the text. As for the spiritual benefit : no doubt in *parvana sradhas* as well as in *Nandi mukh sradhas* the mother's sister's son offers *pindas* to the maternal ancestors of the deceased to whom the deceased was bound to offer *pindas*, whereas the mother's brother's son does only offer two full and a divided *pinda* to them, yet these are not the only *sradhas* that the latter performs as in *ekoddishta sradhas* which are performed for the ancestors in the

(1) (1905) I. L. R., 30 Mad., 406

1916

JAM CHARAN LAL v. RAHIM BAKSH

paternal line only; the mother's brother's son will be offering the two full *pindas* to these very ancestors. Hence, although in individual cases he may be offering a less number of *pindas*, yet the occasions for him to offer *pindas* will be more numerous. Moreover, the offering of *pindas* will be perpetuated in his line as his sons, and so on will continue to offer *pindas*, whereas in the case of the mother's sister's son the offering of *pindas* will cease with his death. The Hindu law does not overlook this perpetuation of *pindas*. Further, in the *tarpan* the mother's brother's son will be offering a larger number of libations of water to his own paternal female ancestors who according to Hindu notions are incorporated with the names of their respective husbands (the maternal ancestors of the propositus) than the mother's sister's son. All these must be kept in view in testing the amount of spiritual benefit.

BANERJI and PIGGOTT, JJ.:—The question raised in this appeal is whether under the Benares School of the *Mitakshara* law, by which the parties to this case are governed, the mother's brother's son succeeds as a *bandhu* in preference to the mother's sister's son. The question arises out of the following facts. One Hori Lal, who is said to have originally owned the property in dispute, died many years ago leaving him surviving his mother Musammat Jhumma, who succeeded him and remained in possession till her death, 7 or 8 years ago. Musammat Jhumma had two brothers, Kishun Das and Jhaujhan Rai, and two sisters, Musammats Lachmuna and Behna. Narayan Das, son of Behna, is admittedly alive but is not a party to this suit. Three of the sons of Kishun Das sold three-fourths of what they alleged to be their interest in the property to the plaintiff appellant. On the strength of the sale deed executed in his favour the plaintiff brought the present suit for partition of a 9/20th share, for possession of that share and for other reliefs. The respondent to this appeal and the connected appeal No. 1387, contended that the vendors of the plaintiff did not succeed to the estate of Hori Lal in preference to Narayan Das, the son of Hori Lal's mother's sister, and that the plaintiff has consequently acquired no title under his purchase and has no right to sue. They thus set up the *jus tertii* of Narayan Das. They put forward other pleas

also with which we are not concerned in this appeal. The court of first instance held that the mother's brother's son had precedence over the mother's sister's son and over-ruling the other pleas raised by the defendants decreed the claim. This decision was reversed by the lower appellate court on the sole ground that in its opinion the mother's sister's son was a preferential heir. It has followed the recent ruling of the Madras High Court in *Appandai Vathiyar* v. *Bagubati Madaliyar* (1). The question is by no means free from difficulty and except the ruling to which we have referred there is, as far as we are aware, no case in which the point was directly raised and decided. And we have not been referred to any text, authoritative in the Benares School, in which the order of succession among *bandhus* of each class has been clearly laid down. According to the *Mitakshara*, *bandhus* who succeed on failure of gentiles or *gotrajas*, are of three classes: (1) related to the person himself (2) to his father and (3) to his mother. The author then refers to the following text which is attributed to SATATAPA or BAUDHAYANA:—"The sons of his own father's sisters, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred" (*atma bandhus*). The same relations of his father and mother are mentioned as his father's *bandhus* (*pitri bandhus*) and his mother's *bandhus* (*matri bandhus*) respectively (*Mitakshara* chapter II, section 6, paragraph 1). In the following paragraph it is stated that "by reason of more affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." The order of priority among cognate *bandhus* of each of the three classes mentioned is thus clearly laid down; but not among persons constituting cognate *bandhus* of each class. Had the enumeration of each class of *bandhus* been exhaustive it might with much force be contended that the son of the mother's sister having been mentioned before the maternal uncle's son would take priority over the latter. But it has been

(1) (1909) I. L. R., 32 Mad., 433

1910

RAM CHARAN LAL v. RAMJI RAISH

held by their Lordships of the Privy Council in *Girdhari Lal* v. *The Bengal Government* (1), that the enumeration of *bandhus* in the *Mitakshara* is not exhaustive but only illustrative of the proposition that there are only three classes of *bandhus* among whom one's own *bandhus* must be exhausted before those of other classes can come in. The enumeration not being exhaustive it can not be said that the three persons named as one's own *bandhus* (*atma bandhus*) take in the order in which they are named. In addition to the nine persons mentioned in the *Mitakshara* many others have been held to be *bandhus* and their place in the order of succession has to be determined otherwise than by reference to the list in the *Mitakshara* itself. The order of succession is not set forth in any of the commentaries on the *Mitakshara*. The learned Judges of the Madras High Court, who decided the case mentioned in an earlier part of this judgement, relied on the Smriti Chandrika and the Saraswati Vilas, which are of high authority in the Madras Presidency but not in these Provinces, and the Vyavahara Mayukha, which is a high authority in the Western Presidency; but a reference to these authorities shows that in them also no order of succession was prescribed as between persons who came within each of the three categories of *bandhus*. All that they declare is that as between each class of *bandhus* one's *atma bandhus* take precedence over *pitri bandhus* and the latter over *matri bandhus*. In chapter XI, section 5, paragraph 13, of the Smriti Chandraka, what the learned author, Devananda Bhat, says, quoting Brihaspati, is that when there are many cognate kindred (*Bandhewak*) "whoever is nearest of kin takes the wealth of him who dies without male issue." He then gives the same description of the *bandhavas* as is contained in the *Mitakshara*; but does not lay down any order of precedence among *bandhus* of each class *inter se*. It is in the summary given at the end of the section that the translator, T. Krishnaswamy Iyer, gives, among the nine *bandhus* mentioned in the *Mitakshara* lists, the mother's sister's son a higher place than the maternal uncle's son. It may be pointed out that this translation was first published in 1866, before their Lordships of the Privy Council decided the

(1) (1868) 12 Moo. I. A. 448

case of *Girdhari Lal Roy* v. *The Bengal Government* (1) to 1868. The learned translator apparently considers the list to be exhaustive. As for the *Sraswati Vilas* the learned Judges themselves point out, as strange, that "though in this treatise there is a discussion and a decision in *placita* 597 and 598 as to the precedence of *atma bandhus* over *pitri bandhus* and of the latter over *matri bandhus*, there is none as to the order amongst the *bandhus* of each class."

As regards the Vyavahara Mayukha the learned Judges of the Bombay High Court held in *Mehudar* v. *Krishna Bai* (2) that by the text in the Vyavahara Mayukha that "the order of succession is even the order of the text" the author intended "no more than is stated in the *Mitakshara* (chapter II. section 11, paragraph 2) viz. that by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance, on failure of them his father's cognate kindred; or if there be none, his mother's cognate kindred." It is thus manifest that none of the three authorities relied upon by the learned Judges of the Madras High Court supports their view that the order of succession among *bandhus* of each class should be that mentioned in the text of SATATAPA quoted in the *Mitakshara*. In the case of *Girdhari Lal Roy* v. *The Bengal Government* (1), the Judicial Committee of the Privy Council expressed the opinion that the *Mitakshara* only laid down the order of precedence among the three classes of *bandhus*, and the enumeration of each class of *bandhus* being only illustrative, the maternal uncle, who was not mentioned by the *Mitakshara* succeeded as a *bandhu*. In the Bombay case referred to above the maternal uncle was held to take precedence over the mother's sister's son. The learned Vakil for the respondent referred to a passage in the Madanaparijat, which has been translated in Sarvadhicary's Tagore Law Lectures and in Setlur's Hindu law. The two translations differ from one another, but in any view the author of the Madanaparijat seems only to lay down, as the *Mitakshara* does, the order of priority among *bandhus* of each of the three classes of *atma bandhus*, *pitri bandhus*, and *matri bandhus*.

(1) (1868) 12 Moo. I. A., 448. (2) (1881) I. L. R., 5 Bom., 597.

1916

RAM CHARAN LAL v. RAHIM BAKSH

There being thus an absence of authority among Sanskrit text writers and commentators as to the order in which *bandhus* of each class should take precedence among themselves we have to follow the text of Manu " to the nearest *sapinda* the inheritance next belongs " and determine the order of precedence with reference to that text. The *Mitakshara* itself assigns the reason for preference to be nearness of affinity (Chapter II, Section vi, sloka 2). We have therefore to see whether the maternal uncle's son is a nearer *sapinda* than the mother's sister's son. Mr. Mayne places the former before the latter on the ground of nearness of propinquity in the chart on page 810 of the 8th Edition of his well-known work He points out, as indeed the whole scheme of the *Mitakshara* shows, that the *Mitakshara* gives preference to the male over the female line (page 811) and following this preference he assigns the 9th place to the maternal uncle, the 10th to his son, and the 11th to the mother's sister's son. Professor Sarvadhicari, in the Tagore Law Lectures on the Hindu Law of Inheritance, gives preference to the maternal uncle and his son over the mother's sister's son (See page 712), and so does Bhattacharya in his Commentaries on Hindu Law (page 460). The Madras High Court in *Trimala Chariyar* v. *Andal Ammal* (1) expressed the opinion that " the general preference exhibited by the *Mitakshara* for the male over the female line . . . may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links." In this view the mother's brother's son, who is separated by only one female link is to be preferred to the mother's sister's son who is separated by two such links. The weight of authority, therefore, seems to be in favour of the proposition that the maternal uncle's son is a preferential heir as compared with the mother's sister's son and we are unable to agree with the decision in *Appandai Vathiyar* v. *Buyubali Mudaliyar* (2). According to Mr. Golap Chandra Shastri (Hindu Law, page 295), these *bandhus* are of equal degree, but we

(1) (1905) I. L. R., 30 Mad., 406.

(2) (1908) I. L. R., 33 Mad., 439.

see no reason to agree with him. Even according to him the plaintiff's vendors would not be totally excluded.

1916

RAM CHARAN LAL v. RAMJU BASIN

We were asked to consider the question of religious efficacy and the recent ruling of the Privy Council in *Budha Singh* v. *Lalta Singh* (1), was referred to. As we hold that the maternal uncle's son is of nearer consanguinity than the maternal aunt's son, the question of funeral oblations need not be considered. We may observe that the plea of superior efficacy of oblations was fully answered by the Madras High Court in the case in I. L. R., 33 Mad., 439.

As the mother's brother's son is, for the reasons stated above, a preferential heir, as compared with the mother's sister's son, the court below was wrong in dismissing the claim, and its decree must be set aside and the case remanded for trial of other questions which were not determined by that court. We, accordingly, allow the appeal, reverse the decree of the court below and remand the case to that court under Order XLI, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number and try the other questions which arise in the appeal. Costs here and hitherto will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

GHROPEY LAL (PLAINTIFF) v. LAKHMI CHAND MAGAN LAL (DEFENDANT)* 1916

April, 13

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *section* 17—*Civil Procedure Code* (1908), *section* 24—*Suit transferred from Subordinate Judge with Small Cause Court powers to Munsif*—*Ex parte decree*—*Procedure.*

Held, that section 24, sub-clause 4, of the Code of Civil Procedure contemplates a court vested with the powers of a Court of Small Causes and that when a suit is transferred from that court to another court, the court trying it is to be deemed a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore when such a suit is transferred to a Munsif from the court of a Subordinate Judge vested with Small Cause Court powers and the former passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of the amount as required by section 17 of the Provincial

* Civil Revision No. 23 of 1916.

(1) (1915) I. R. L., 37 All., 604.

1916

CHHOTEY LAL v. LAKSHMI CHAND MADAN LAL

Small Cause Courts Act, the provisions of which are mandatory. *Mangal Sen* v. *Rup Chand* (1), *Jagan Nath* v. *Chet Ram* (2) referred to. *Sarju Prasad* v. *Mahadeo Pande* (3), distinguished.

A SUIT to recover Rs. 282 as damages on account of the breach of a contract for supply of goods was instituted as a Small Cause Court suit in the court of the Subordinate Judge of Muttra, who was vested with the jurisdiction of a Court of Small Causes up to the pecuniary limit of Rs. 500. The suit was transferred by order of the District Judge to the court of the Munsif of Muttra, who had been invested with Small Cause Court jurisdiction up to the limit of Rs. 50 only. On the date fixed for hearing, the defendant did not appear and the suit was decreed *ex parte*. The decree was drawn up in the form in which decrees of a Court of Small Causes are drawn up. Within thirty days of the *ex parte* decree the defendant applied to have it set aside, alleging that he had been prevented by illness from attending on the date fixed for hearing. At the time of presenting the application he neither deposited the decretal amount nor gave security for the performance of the decree as required by section 17 of the Provincial Small Cause Courts Act. Objection on this score was taken by the plaintiff, but the Munsif held that the section did not apply and granted the defendant's application. The plaintiff thereupon applied in revision to the High Court.

Munshi *Gulzari Lal*, for the applicant:—

Section 24, clause (4), of the Code of Civil Procedure lays down that when a suit is transferred from a Court of Small Causes to another court the latter shall, for the purposes of such suit, be deemed to be a Court of Small Causes. Therefore the Munsif of Muttra was, to all intents and purposes, so far as this suit was concerned, a Court of Small Causes; so that all the incidents applicable to a suit tried by a Court of Small Causes apply to the present suit. The suit remained throughout a Small Cause Court suit and as a matter of fact the summary procedure, form of decree, etc., usual to Small Cause Court suits, were adopted by the Munsif in disposing of the case. Reference was made to *Mangal Sen* v. *Rup Chand* (1) and *Sankararama Iyer* v. *R. Padmanabha Iyer* (4). Section 17 of the Provincial Small

(1) (1891) I.L.R., 13 All., 324.
(2) (1906) I.L.R., 28 All., 470.
(3) (1915) I.L.R., 37 All., 460.
(4) (1912) I.L.R., 39 Mad., 93.

Cause Courts Act, therefore, applied to the case and the defendant should with his application have either deposited the decretal amount or given security. He having failed to do so, his application could not be heard, as the provisions of section 17 are mandatory; *Jagan Nath* v. *Chet Ram* (1). The Munsif has held that section 17 is not applicable to the case, inasmuch as section 24, clause (4), of the Civil Procedure Code applies only to suits originally instituted in "purely" Small Cause Courts; that is to say, courts constituted under the provisions of Act IX of 1887. This point was raised and negatived in the case in I. L. R., 33 Mad., 25.

Mr. *M. L. Agarwala*, for the opposite party:—

The words used in section 24, clause (4), Civil Procedure Code, are "a Court of Small Causes" and not "a court invested with the jurisdiction of a Court of Small Causes." A Civil Court upon which the powers of a Court of Small Causes have been conferred under section 25 of Act XII of 1887, is not necessarily "a Court of Small Causes," which words, strictly speaking, can be applied only to courts constituted under the Provincial Small Cause Courts Act. That Act itself recognizes the distinction between these two classes of courts; *vide*, the language used in sections 33, 34 and 35 of the Act. In section 35, the two classes of courts are mentioned in juxtaposition to each other; if no difference had been intended or recognized it would be unnecessary to say, in section 35, "a Court of Small Causes or a court invested with the jurisdiction of a Court of Small Causes." The Munsif of Mutra was not invested with jurisdiction to try this suit as a Small Cause Court suit. When the case came before him he could try it only as a suit of ordinary civil jurisdiction. The suit could not continue to be a Small Cause Court suit. The Judges who decided that case of *Sarju Prasad* v. *Mahadeo Pande*, (2) dissented from the case in I. L. R., 13 All., cited by the applicant. Then, the merits having been found in favour of the defendant the order of the lower court which directs a re-trial of the suit should not be interfered with in revision.

BANERJI, J.—This is an application for revision under section 25 of the Provincial Small Cause Courts Act. The suit out of

(1) (1903) I. L. R., 28 All., 470 (2) (1915) I.L.R., 37 All., 150

1915.

CHHOTEY LAL v. LARKO GHANI MIAN.

which it arises was instituted in the court of the Subordinate Judge of Muttra, who was vested with the powers of a Judge of a Court of Small Causes. By an order of the District Judge the case was transferred to the court of the Munsif of Muttra. The learned Munsif passed an *ex parte* decree on the 28th of September, 1915, the defendant not having entered appearance. The defendant thereupon applied to have the *ex parte* decree set aside on the allegation that he had been prevented by illness from attending the court on the date fixed for hearing. He did not deposit with his application the amount of the decree, nor did he furnish security in respect of that amount as required by section 17 of the Provincial Small Cause Courts Act. The plaintiff objected to the hearing of the application on the ground that no deposit had been made or security furnished. The learned Munsif overruled the objection relying on the recent decision of this Court in *Sarju Prasad* v. *Mahadeo Pande* (1). That case clearly had no bearing on the question before me. That was not a case in which a suit had been transferred from a court vested with the powers of a Small Cause Court to the court of a Munsif. The real question in this case is whether section 17 of the Small Cause Courts Act applies to the present case. For the determination of this question it is to be seen whether the learned Munsif who made the decree *ex parte* was to be deemed to be a Judge of a Court of Small Causes and his procedure was to be governed by the procedure laid down in the Provincial Small Cause Courts Act. Section 24 of the Code of Civil Procedure provides in sub-section 4, that the court trying any suit transferred or withdrawn under the section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. If the court from which the suit was transferred to the learned Munsif was a Court of Small Causes within the meaning of the section the court of the Munsif was, for the purposes of the suit, to be deemed to be a Court of Small Causes and its procedure was to be governed by the procedure laid down in the Provincial Small Cause Courts Act. If that procedure applied to the case before me it was incumbent on the defendant, who applied to have the *ex parte* decree set aside, to deposit with his application

(1) (1913) I. L. R., 37 All., 320.

the amount of the decree or to furnish security in respect of that amount. It was held by the Court in *Jagan Nath* v. *Chet Ram* (1), that the provisions of section 17 of the Provincial Small Cause Courts Act, were mandatory and that unless the amount of the decree were deposited or security furnished, the application could not be entertained. Therefore if section 17 applied to the case the court below was wrong in entertaining the application, inasmuch as the defendant had not with his application deposited the amount of the decree or furnished security. It has been contended that the Court of Small Causes, referred to in section 24 of the Code of Civil Procedure, is a Court of Small Causes established under Act IX of 1887, and that the provisions of that section are not applicable to a court which was vested with the powers of a Court of Small Causes. This contention is in my opinion untenable. Section 33 of the Small Cause Courts Act provides that a court invested with the jurisdiction of a Court of Small Causes shall, with respect to the exercise of that jurisdiction, be deemed to be a different court from the same Court with respect to the exercise of its jurisdiction in suits of a nature not cognizable by a Court of Small Causes. This clearly shows that a court vested with the powers of a Court of Small Causes is to be deemed, for all practical purposes, to be a Court of Small Causes, and section 24 of the Code of Civil Procedure empowers the district court to transfer a case pending in such court to any other court. When such a transfer has been made the court trying the suit is to be deemed to be a court of Small Causes and all the provisions of the Small Cause Courts Act should regulate the procedure of that court in respect of the suit so transferred. In *Mangal Sen* v. *Ray Chand* (2), this Court held that a suit transferred from the court of a Subordinate Judge vested with Small Cause Court powers was to be deemed to be a Small Cause Court suit when tried by a Munsif to whose court it was transferred, and no appeal lay from the decision of the Munsif. The opinion expressed in that case as to the applicability or otherwise of section 25 of the Small Cause Courts Act to such a suit was no doubt dissented from in the case of *Sarju Prasad* v. *Mahadeo Pande* (3), but in so far as the Court held

1915

CHHETRY LAL v. LAKHMI CHAND MADAN LAL.

(1) (1903) I.L.R., 26 All., 270 (2) (1891) I.L.R., 13 All., 324.
(3) (1915) I.L.R., 37 All., 463

1916

CHHOTEY LAL v. LAKHMI CHAND MAGAN LAL.

that a suit transferred from the court of a Subordinate Judge vested with the powers of a Small Cause Court Judge to another court was to be deemed to be a suit brought in a Court of Small Causes the ruling was not disapproved of. A similar view was held by the Madras High Court in the recent case of *Sankarama Iyer* v. *R. Padmanabha Iyer* (1). I am of opinion that a court vested with the powers of a Court of Small Causes is contemplated by section 24 of the Code of Civil Procedure, and that when a suit is transferred from that court to another court, the court trying it is to be deemed to be a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore when such a suit is transferred to a Munsif and he passes an *ex parte* decree in the suit an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of that amount. No deposit having been made or security furnished at the time of the presentation of the application by the defendant in this case, that application ought to have been dismissed and the court below was wrong in entertaining it. I accordingly allow this application for revision, set aside the order of the court below and dismiss the application presented in that court by the defendants on the 11th of October, 1915. Having regard to the circumstances I make no order as to costs.

Application allowed.

APPELLATE CRIMINAL.

1916.
April, 13.

Before Mr. Justice Piggott.

EMPEROR v. JAWAHUR THAKUR *

Act No. XLV of 1860 (Indian Penal Code), sections 30 and 467—"Valuable security"—Forgery—Incomplete documents bearing forged signature of executant.

Two documents were found in the possession of the accused each bearing a signature which purported to be that of one Buddhayachal, but which in fact was a forged signature. One document was intended to be filled up as a promissory note, the other as a receipt, but the spaces for particulars of the amount, the name of the person in whose favour the document was executed, the date and place of execution and the rate of interest were

* Criminal Appeal No. 234 of 1916, from an order of Sris Raghuvansa Lal, additional Sessions Judge of Gorakhpur, dated the 28th of February, 1916.

(1) (1913) I. L. R., 36 Mad., 25.

not filled in, a one-anna stamp was affixed to each but it was not cancelled in any way.

Held that these documents, nevertheless, purported to be valuable securities within the meaning of the language contained in section 30 of the Indian Penal Code *Queen Empress v. Ramasami* (1) referred to

1916

EMPEROR v. JAWAHIR THAKUR.

IN this case one Jawahir was convicted of an offence punishable under section 474 of the Indian Penal Code, in respect of two documents, found in his possession. The documents were a blank promissory note and a blank receipt. Both purported to have been signed by one Bindhayachal. At the top of each was a one-anna adhesive stamp, but the signature was not written across the stamp, nor was the stamp cancelled in accordance with the provisions of section 12 of the Indian Stamp Act. The papers were, in fact, printed forms with none of the particulars filled in. There was no specification of the person in whose favour either document purported to have been executed, nor of the date or place of execution nor of the amount of money involved. From his conviction and sentence Jawahir appealed to the High Court.

Munshi *Kanhaya Lal*, for the appellant.

The Government Pleader (Babu *Lalit Mohan Banerji*) for the Crown.

PIGGOTT, J.—The appellant Jawahir has been convicted of an offence punishable under section 474 of the Indian Penal Code, in respect of a document, or more strictly speaking, of two documents endorsed on separate halves of a sheet of paper alleged to have been found in his possession. The documents in question are a blank promissory note and a blank receipt. Both purported to be signed by one Bindhayachal. At the top of each of these papers there is an adhesive stamp of one anna; but the signature is not across the stamp, nor has the stamp been cancelled in accordance with the provisions of section 12 of the Indian Stamp Act, No. II of 1899. The papers in question are blank in this sense, that they are printed forms with none of the particulars filled in. There is no specification of the person in whose favour either document purports to be executed, nor yet of the date or place of execution nor yet of the amount of money involved. The document purports on the face of it to be a receipt whereby Bindhayachal

(1) (1888) I. L. R. 12 Mad. 48.

1916

EMPEROR v. JAWAHIR THAKUR.

acknowledges to have received an unspecified sum of money, on an unspecified date from some person not specified. Similarly the other document purports to be a promissory note whereby Bindhayachal binds himself to pay to, or to the order of, an unspecified person, an unspecified sum of money, with interest and compound interest after six monthly rests, the rate of interest also remaining unspecified. What I have been asked to consider on appeal is whether all the requirements necessary to a conviction under section 474 of the Indian Penal Code have been satisfied. The first question is whether these documents are forgeries.

[His Lordship then discussed the evidence and found that they were forgeries and that their possession by the accused was proved.]

There remains however one point to be considered before the conviction can be affirmed. The learned Sessions Judge has assumed that the documents in question, as they stand, are "valuable securities" within the meaning of the definition contained in section 30 of the Indian Penal Code, and falling within the scope of section 467 of the same Code. A very ingenious argument to the contrary has been pressed upon my notice on behalf of the appellant. If the signature of the alleged Bindhyachal upon these documents had been across the adhesive stamps, or those stamps had been otherwise cancelled in accordance with section 12 of the Indian Stamp Act, No. II of 1899, there could be no possible question as to the provisions of section 20 of the Negotiable Instruments Act, No. XXVI of 1881, operating in respect of these documents. Even it is said to be conceded that the documents as they stood did not purport to be valuable securities, they would by and all question purport to be documents giving authority to the holder of the same to make a valuable security. No doubt the holder of these documents had no intention of propounding them or using them in a court of law without first cancelling the adhesive stamps; but the documents as they stand cannot be said to be stamped in accordance with law. I am of opinion, however, that these documents must be held to be, as they stand, "valuable securities" within the meaning of section 30 of the Indian Penal Code. There is an old case in volume VII of the Madras High Court Reports, Appendix XXVI in which the

meaning of the words "purports to be" was considered, and it was held that a document which had not been stamped, and was therefore not admissible in evidence, might nevertheless be a valuable security. The same point was again decided in the case of *Queen Empress v. Ramasami* (1). I am satisfied that the two papers in respect of which the appellant has been convicted do purport to be documents whereby a legal right is created within the meaning of section 30 of the Indian Penal Code. The appellant has therefore been rightly convicted.

1914
Emperor
v.
Jawahir Singh.

As regards the question of sentence, I must say that I should feel it more satisfactory if I were in a position to consider this question after having before me the result of the proceedings which I understand have been instituted in respect of the mortgage deed propounded by Jawahir subsequently to the discovery of these two documents in his possession. As the case now stands before me, I am not prepared to say that the sentence passed is unduly severe. I dismiss this appeal.

Appeal dismissed.

APPELLATE CIVIL.

1916
May 4

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

IMAMI (PLAINTIFF) *v.* MUSAMMAT KALLO (DEFENDANT) *

Guardian ad litem—Contract—Specific performance—Specific performance of contract for sale of minor's property.

The District Judge sanctioned the sale by the certificated guardian of a minor of a house belonging to the minor for a price of Rs. 1,900. There arose, however, some dispute about the following of the deed of sale and the purchase was not carried through. Meanwhile other offers were made for the property, and ultimately the District Judge directed that the house should be sold to one Abdullah for Rs. 2,060.

Held, on suit brought by the person in whose favour the sale had originally been sanctioned, that the court was in the circumstances justified in refusing to grant a decree for specific performance. *Okhtar Mal v. Jagan Nath Prasad* (2), referred to.

THE facts of the case were as follows:—

One Shahzada who is the uncle of the minor defendant's husband and was appointed guardian of her person and property by

* First Appeal No. 30 of 1915, from a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 19th of August, 1914.

(1) (1885) I. L. R., 12 Mad., 148. (2) (1897) I. L. R., 20 All., 213

1916

IMAMI
v.
MUSAMMAT
KALLO

the court, applied for permission to sell the house in suit to pay off certain debts due by the minor. The District Judge, by his order dated the 15th of June, 1912, allowed Shahzada to sell the house to the highest bidder. It was put up for auction sale on the 23rd of June, 1912, and Imami the appellant offered Rs. 1,300 for it. He was directed by the District Judge to deposit the money in the bank which he did. The appellant then made out a draft sale-deed and it was put before the District Judge for his approval That officer made certain amendments in the deed and on the 3rd of August 1912, ordered that the sale-deed be drawn up according to the amended draft. Imami the appellant was supplied with a copy of the amended draft and being under the misconception that the amendments had been made by Shahzada, refused to purchase the house until Shahzada and his brother, one Raja Ram, also executed an indemnity bond On the 3rd of February, 1913, one Gayadin applied to the District Judge to be allowed to purchase the house for Rs. 1,600, on the terms of the amended sale-deed and Imami getting notice of this application, expressed his willingness to purchase the house for Rs. 1,300, according to the amended draft. The District Judge holding that the sale to Imami had been completed dismissed the application of Gayadin. Gayadin then offered Rs. 2,000 for the house and one Haji Abdulla offered Rs. 2,200 for the house in suit The District Judge therefore ordered the guardian Shahzada to sell the house to the highest bidder. Imami thereupon instituted this suit for specific performance of a contract of sale against the minor Musammat Kallo and for compulsory execution of the sale-deed The Subordinate Judge, holding that a contract detrimental to the minor's interest could not be specifically enforced, dismissed the suit. The plaintiff appealed to the High Court

The Hon'ble Dr *Tej Bahadur Sapru*, for the appellant:—

When there was a contract and in pursuance of that contract the plaintiff had done something, he is entitled to a decree for specific performance Here the vendee appellant deposited Rs 1,300 in the bank. The learned Subordinate Judge has clearly found that the contract for sale was complete. If so, I am entitled to a decree. The appellant at first thought that the amendment had been made by the minor's guardian and

1916

IMAM v. MUBARIKAT KALLO.

therefore he demanded an indemnity bond. As soon as he discovered that the amendments had been made by the District Judge he consented to purchase. A minor's interest should certainly be protected, but not at the cost of others. The house according to the guardian's own statement is worth Rs. 900. The case of *Mir Sarwarjan* v. *Fakhr-uddin* (1) has been distinguished in a later case, viz. *Babu Ram* v. *Said-un-nisa* (2). In *Mir Sarwarjan's* case the contract was made by a manager of a minor's estate. In the present case the contract was made by a certificated guardian and sanctioned by the court. Section 21, clause 2, of the Specific Relief Act, is no hardship to the minor. The value of the property is Rs. 900. If some person for some particular reason peculiar to himself is offering Rs. 2,200, that does not make any difference to the intrinsic value of the property. A suit of this kind has been held to be maintainable in *Krishnasami* v. *Sundarappayyar* (3). A decree for specific performance of contract can be given against a minor when it is for the benefit of the minor *Khair-un-nissa* v. *Loke Nath* (4).

The sale will admittedly be for the benefit of the minor and that is the reason why it was allowed by the District Judge. The mere intervention of some extrinsic facts does not make this sale any the less beneficial. A sale for a larger amount will certainly be more beneficial but that does not prove that a sale to us will not be beneficial. That the sale to my client is for the benefit of the minor is clear from the fact that it was sanctioned by the District Judge. Sections 28, 29 and 30 of the Guardian and Wards Act create a presumption in my favour.

Dr. *Surendra Nath Sen* (Babu *Anurup Chandra Mukerji* with him) for the respondent :—

The case in 35 Allahabad is not in point as it was not a case for specific performance. *Chittar Mal* v. *Jagannath* (5) is entirely in my favour. The District Judge as the absolute guardian of every minor should always have a *locus poenitentiae*. When new facts came to the knowledge of the District Judge he was certainly justified in recalling his previous order and directing a fresh auction sale.

(1) (1912) I. L. R., 39 Calc., 382. (3) (1896) I. L. R., 18 Mad., 415
(2) (1913) I. L. R., 35 All., 493. (4) (1903) I. L. R., 27 Calc., 378.
(5) (1907) I. L. R., 29 All., 213.

1916

IMAMI v. MUSAMMAT KALLO

The Hon'ble Dr. *Tej Bahadur Sapru*, was heard in reply.

BANERJI and PIGGOTT, JJ.:—This appeal arises out of a suit for specific performance of an alleged contract of sale in respect of a house. The plaintiff also asks for a declaration that he has become the absolute owner of the house. The facts are these. The house in question belongs to the minor defendant Musammat Kallo. One Shahzada was appointed guardian of the minor under the orders of the District Judge of Allahabad. The guardian Shahzada applied to the District Judge for permission to sell the house in question for the payment of debts due by the minor. The District Judge ordered the property to be sold by auction to the highest bidder. The highest bid made was by the present plaintiff Imami, who offered to pay Rs 1,800 for the property. On the 8th of July, 1912, the District Judge made an order to the effect that Shahzada, the guardian of the minor, was permitted to execute a sale-deed in favour of Imami, the draft being put up before the court for approval prior to the execution of the sale deed. A draft was submitted and the District Judge made certain alterations in it. Imami, however, refused to purchase the property on the ground that the alterations in the draft which he believed had been made by or on behalf of the guardian did not meet with his approval. This is clear from the notice which he issued to the brother of the guardian in February, 1912, in which his pleader distinctly stated that he had refused to purchase the property. Subsequently it seems he consented to accept the purchase, but nothing was done for a long time. Meanwhile other persons had offered to purchase the property for a larger value and on the 25th of November, 1913, the learned District Judge granted permission to the guardian to sell the property for Rs. 2,000 to another party. Thereupon the present suit was brought by the plaintiff on the 3rd of February, 1914. He stated in the plaint that he had by reason of the sanction given by the District Judge to sell the property to him, acquired the ownership of the property and that he was entitled to obtain a sale-deed of it from the guardian. As we have stated above, Shahzada was the guardian appointed by the District Judge, but Shahzada is no party to the present suit. When the

but he refused to act as guardian and thereupon another person, namely Mata Ghulam, was appointed guardian *ad litem*. Shahzada was not impleaded in his own person as a defendant. It would therefore be difficult, if the claim were allowed, to order Shahzada, who is no party to the suit, but who is the certificated guardian of the minor, to execute a sale-deed in the plaintiff's favour. The court below has dismissed the claim on the ground that the sale to the plaintiff would be detrimental to the interests of the minor. There can be no doubt that in a suit for specific performance it is in the discretion of the court to decree specific performance or not and in no case would the court be justified in enforcing performance against a minor "when such enforcement would be to his detriment." This was held by this Court in *Chittar Mal* v. *Jaganath Prasad* (1). In the present case it is clear that there being a purchaser who has offered more than Rs. 2,000 for the property and for a sale to whom the learned District Judge has granted permission to the guardian, the sale to the plaintiff would surely not be to the benefit of the minor. On this ground alone the court would be justified in refusing to grant a decree to the plaintiff. Furthermore, there are in this case circumstances which would make it unreasonable to grant the plaintiff's prayer. The original permission for the sale of the property was given so far back as July, 1912. In September of that year the court said that if the draft approved by the court was accepted, a sale-deed might be executed in the plaintiff's favour. Apparently the plaintiff did not accept the draft, and as his own notice to which we have referred above shows, he refused to purchase the property. It was not until other purchasers offered larger sums of money for the property that the plaintiff expressed his willingness to accept the terms offered. Under these circumstances we think the plaintiff is not entitled to the decree asked for. It is clear that he has not acquired any interest in the ownership of the property as he asserted in his plaint. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1907) I. L. R., 29 All., 213.

1916
May, 8.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

RADHIKA PRASAD BAPUDI (APPLICANT) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY)*

Act No. VII of 1889 (Succession Certificate Act)—Certificate refused—Matters to be proved to entitle applicant to a certificate.

A Government promissory note payable to one Madho Sahai was assigned by a registered deed by the legal representative of Madho Sahai to one Radhika Prasad. Upon the assignee applying for a certificate of succession in respect of this note, it was refused on the ground that it was not established that the assignor had himself a good and subsisting title to the note.

Held, that whether the assignor of the applicant had a valid title or not, or whether the assignment conveyed any title to the applicant, or whether the debt secured by the promissory note was recoverable or not, were not matters which the court had to determine upon an application for a certificate. The only question which the court had to decide was whether the applicant was the representative of the person to whom the debt was alleged to have been due.

THIS was an appeal arising out of an order of the District Judge of Benares rejecting an application for the issue of a succession certificate with reference to a promissory note which was issued in the year 1845, upon the annexation of Tanjore by the British Government. The note in question was one of a number of notes which were called the Tanjore debt notes. One of these notes was issued to one Madho Sahai of Benares who died in 1862. In 1853, the Government of Madras issued a notification that it had reason to suspect that note number 307, issued to Madho Sahai, had never come into his hands, and the Government was prepared to consider the claim of persons entitled to it, and upon proof of the claim, the liability under the note was to be discharged in September, 1854. Neither Madho Sahai nor his heirs put forward any claim. In 1892, however, one Jiban Lal claimed payment of the money on the allegation that the note in question had been endorsed by Madho Sahai, the original holder, to Girdhari Lal the predecessor-in-title of the applicant. This claim did not find favour with the Madras Government which held that the title of the applicant was not proved. Two more abortive applications were made by Jiban Lal in the years 1898 and 1900. In 1909, the promissory note was sold to the appellant under a registered instrument. It bore the endorsement "pay to Girdhari Lal" which purported to have been signed by Madho

*First Appeal No. 9 of 1916, from an order of B. J. Dalal, District Judge

Sahai. On the presentation of the application in court, the District Judge issued a notice to the Collector. A written statement was put in denying the applicant's right to a succession certificate under the assignment made to him and also a plea as to limitation was raised. The plea of limitation was repelled by the court below. It also held that the applicant was the assignee of Makund Lal, who was the legal representative of Madho Sahai, the original holder. But the application as regards the particular note was refused on the ground that the note bore an endorsement of transfer to Girdhari Lal and consequently any assignment made by the legal representative of Madho Sahai would confer no title upon the applicant.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *A. E Ryves*, for the respondent.

BANERJI and PIGGOTT, JJ. :—The appellant filed an application in the court below for a succession certificate under Act No. VII of 1889, in respect of a Government promissory note described as a part of what is called the Tanjore debt. The promissory note was in favour of one Madho Sahai. He and his brother Beni Sahai are said to have formed a joint family. Madho Sahai died long ago and one of his daughters left two sons, one of whom Madhuri Das, died in 1906, leaving a son Makund Lal. Makund Lal has assigned the note to the present applicant under a deed of assignment and the applicant as such assignee has applied for a succession certificate. The court below refused to grant his application on the ground that it had not been established to the satisfaction of the court that the applicant's assignor had a subsisting title at the date of the assignment. In our opinion this was not a question which the court ought to have gone into in the present case. Whether the assignor of the applicant had a valid title or not, or whether the assignment conveyed any title to the applicant, or whether the debt secured by the promissory note was recoverable or not, were not matters which the court had to determine upon an application for a certificate. The only question which the court had to decide was whether the applicant was the representative of the person to whom the debt was alleged to have been due. In this case the debt is alleged to have been due to Madho Sahai deceased and there is no doubt, according to the finding of

1916

RADHIKA PRASAD BAPUDI v. SECRETARY OF STATE FOR INDIA IN COUNCIL

the court below, that Makund Lal was the legal representative of Madho Sahai and the applicant is an assignee from him. Therefore the representative title of the applicant was established and in fact the learned Judge granted him a certificate as such assignee in respect of another promissory note. Under these circumstances the applicant was entitled to a certificate in respect of the promissory note No. 307 We allow the appeal and varying the order of the court below, direct that a certificate be issued under the Succession Certificate Act in respect of the promissory note in question No. 307 Having regard to the circumstances we make no order as to costs

Appeal allowed.

PRIVY COUNCIL.

P.C.* 1916 May, 25, 26 June, 21.

CHANDRIKA BAKESH SINGH (PLAINTIFF) v. INDAR BIKRAM SINGH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Title, suit for declaration of—Transfer of estate made to plaintiff by widow of Oudh Talukdar in possession as heir of her husband—Transfer made with consent of all the then existent next reversioners—Refusal of Revenue authorities to record name of plaintiff as proprietor—Title set up by defendant under alleged will of deceased Taluqdar which was found by first court not to have been executed—Transfer found to be valid—Appeal by defendant and admission by him during hearing of appeal of his want of title—Practice—Failure to maintain appeal

This appeal arose out of a suit which related to the transfer to the plaintiff of an impartible estate called Mahgawan by the widow of an Oudh Taluqdar in possession of his estate for a Hindu widow's interest under the Mitakshara law The transfer was made with the consent of the only next reversioners in existence at the date of the execution of the deed of transfer who both attested it The defendant set up a title under an alleged will of the deceased Taluqdar. In a suit brought for a declaration of the plaintiff's title to the estate in consequence of the refusal of the Revenue authorities to have his name recorded as proprietor, the Subordinate Judge held that the defendant had no title as the deceased husband had never executed the alleged will, and that the transfer to the plaintiff was valid. On the hearing of an appeal to the Judicial Commissioner's Court by the defendant, he admitted the correctness of the first court's decision as to his want of title.

Held that the Court of the Judicial Commissioner was wrong in then allowing the appeal and dismissing the suit on the ground that the widow had

Present:—Lord ATKINSON, Lord PARKER of WADDINGTON, Sir JOHN EDGE and Mr. AMEER ALI

no power to transfer the estate. The defendant having no title had no interest which enabled him to support the appeal which should have been dismissed on his admission

APPEAL No. 53 of 1913 from a judgement and decree (25th May, 1911) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (3rd January, 1910) of the Subordinate Judge of Bara Banki

The facts shortly stated were as follows :—The estate in suit was an Oudh taluqa called Mahgawan, of which the second summary settlement was made with one Pirthipal Singh to whom a sanad was granted, and on the passing of Act I of 1869 (the Oudh Estates Act), his name was entered in lists 1 and 2, prepared in accordance with section 8 of the Act. He died on the 11th of March, 1877, and was succeeded by his son Jadunath Singh on whose death on the 25th of July, 1879, his widow Sheoraj Rani succeeded to the estate which at her decease on the 5th of May, 1897, passed to the mother of Jadunath Singh, Maharaj Rani.

On the 13th of December, 1904, Maharaj Rani made an absolute transfer of the estate to Chandrika Bakhsh Singh, the appellant. At that date the only reversionary heirs were Mahabir Singh, the father of the appellant, and Bechu Singh. The deed of transfer was attested by both of them, and expressly recited that it was made with their consent. On the 9th of November, 1908, further deeds affirming the transfer were executed by them. An application made by Maharaj Rani after the transfer to the appellant to have his name recorded in the Revenue registers was opposed by the respondent Indar Bikram Singh, who alleged that Maharaj Rani had no power of transfer, and claimed title under an alleged will of Pirthipal Singh, dated the 25th of June, 1866. Mutation of names was refused by an order of the Commissioner of Fyzabad on the 5th of December, 1905, which was confirmed by the Board of Revenue on the 9th of March, 1908.

In consequence of that refusal and in order to have his title to the estate determined Chandrika Bakhsh Singh on the 11th of December, 1908, brought the present suit for a declaration that he was the absolute proprietor of the estate, making Indar Bikram Singh, Maharaj Rani, Mahabir Singh, and Bechu Singh, defendants, of which the three last named admitted the plaintiff's title. Indar Bikram Singh denied the title of the plaintiff, set up a title in

1916

CHANDRIKA BAKHSH SINGH v. INDAR BIKRAM SINGH.

himself under the will of 1866, and contested the suit on various other grounds, which appears in the judgement of the Judicial Committee.

The Subordinate Judge held that Maharaj Rani had executed the deed of transfer and had given the plaintiff possession of the estate; that Mahabir Singh and Bechu Singh were the next reversioners and had expressly consented to the transfer; and that Pirthipal Singh had not executed the alleged will under which alone Indar Bikram Singh had set up title to the estate. The Subordinate Judge was, however, of opinion that Maharaj Rani was not an absolute owner of the estate under the provisions of Act I of 1869, but that notwithstanding that the transfer was valid as having been made by the consent of the next reversioners.

The Subordinate Judge made a decree in favour of the plaintiff. Indar Bikram Singh appealed from that decision to the Court of the Judicial Commissioner, making Chandrika Bakhsh and Maharaj Rani respondents. The latter died pending the appeal, and subsequently Mahabir Singh and Bechu Singh were made respondents.

At the hearing of the appeal Indar Bikram Singh abandoned the only title under which he could claim, namely, that under the alleged will of Pirthipal Singh, and, as in the absence of the transfer, the estate, on the death of Maharaj Rani, had in fact vested in Mahabir Singh or in him and Bechu Singh, both of whom still satisfied and affirmed the transfer, it was argued that the appeal ought to abate.

That contention was however overruled. The Court of the Judicial Commissioner (Mr. L. G. EVANS, Judicial Commissioner, and Mr. B. LINDSAY, Additional Judicial Commissioner) on the question of law came to the conclusion that the consent of the next reversioners could not make valid a transfer made without consideration; and that the transfer in suit was consequently invalid.

The decree of the Subordinate Judge was accordingly reversed and the suit dismissed with costs.

On this appeal—

De Gruyther, K. C., and *C. O'Gorman*, for the appellant.

A. M. Dunne and *B. Dube*, for the respondent.

After hearing counsel for both parties and without calling on the appellant to reply their Lordships said the appeal would be allowed, and that reasons would be given later.

1916 June, 22nd:—The reasons for the report of their Lordships were delivered by Sir JOHN EDGE :—

This is an appeal from a decree, dated the 25th of May, 1911, of the Court of the Judicial Commissioner of Oudh, which reversed a decree, dated the 3rd of January, 1910, of the Subordinate Judge of Bara Banki and dismissed the suit with costs.

The facts necessary for the decision of this appeal may be briefly stated. The dispute relates to the appellant's title to an Oudh taluqa, known as Mahgawan, which was an impartible estate. The parties are Hindus, subject to the law of the Mitakshara. On the 13th of December, 1904, Babuain Maharaj Rani, who held Mahgawan for a Hindu widow's interest, made, by a deed of gift, an absolute transfer of Mahgawan to the appellant, and he obtained possession. To that transfer Mahabir Singh and his younger brother, Bechu Singh, were consenting parties. At the time of the transfer Mahabir Singh was the heir to Mahgawan expectant on the death of Babuain Maharaj Rani, and the appellant is his only son. Upon the transfer to him the appellant applied to the Revenue authorities for mutation of names in his favour. On the 9th of January 1905, the respondent, who was not a member of the family which had held Mahgawan, filed objections to mutation of names being made in the appellant's favour, alleging that Babuain Maharaj Rani had no power to transfer the estate, and claiming title to it in himself under an alleged will of 1896, of Babu Pirthipal Singh, who had been the husband of Babuain Maharaj Rani. In consequence of the respondent's objection, the Revenue authorities on appeal rejected the appellant's application for mutation of names, and the appellant, in order to clear his title and obtain mutation of names, was compelled to bring his suit. He brought this suit on the 11th of December, 1908, in the Court of the Subordinate Judge of Bara Banki, for a declaration of his title as proprietor of Mahgawan.

To the suit the respondent, and Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh were made defendants. By

1916

CHANDRIKA BAKHSH SINGH v. INDAR BIKRAM SINGH

their written statements Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh admitted the appellant's title, and Mahabir Singh and Bechu Singh expressly alleged that it was with their consent that Babuain Maharaj Rani had executed the deed of gift of the 13th of December, 1904, and that they had on the 9th of November, 1908, executed deeds of relinquishment in favour of the appellant, who was in proprietary possession of the taluqa.

The respondent in his written statement denied the appellant's title, did not admit that Babuain Maharaj Rani had executed the deed of gift of 1904; denied that she had any power to transfer the estate to the appellant; did not admit that the appellant was in proprietary possession; alleged that Mahabir Singh and Bechu Singh were not legitimate; alleged that the nearest reversioners were persons whom he described as Girdhara Singh and Kalka Singh; and asserted title in himself through the alleged will of 1866 of Babu Pirthipal Singh.

The Subordinate Judge of Bara Banki found that Babuain Maharaj Rani had executed the deed of gift of 1904, in favour of the appellant with the consent of Mahabir Singh and Bechu Singh, who were, he found, legitimate; that the taluqa passed under that deed of gift to the appellant; that the appellant was then and had been since the date of the deed of gift in proprietary possession of the taluqa; that Girdhara Singh and Kalka Singh were fictitious persons; and that Babu Pirthipal Singh had not made the alleged will of 1866; and gave to the appellant a declaration that he was the absolute proprietor of the properties detailed in Schedules A, B, and C to the plaint, and would continue to be such proprietor after the death of Babuain Maharaj Rani.

From that decree the respondent, on the 31st of March, 1910, appealed to the Court of the Judicial Commissioner of Oudh, making the appellant and Babuain Maharaj Rani respondents to his appeal. In June, 1910, Babuain Maharaj Rani died. On the 9th of February, 1911, Mahabir Singh and Bechu Singh respectively filed petitions and affidavits in the appeal in the Court of the Judicial Commissioner, in which they asserted that the deed of gift of the 13th of December, 1904, had been executed by Babuain Maharaj Rani by their advice and with

1916

CHANDRIKA PARSHAD SINGH v. INDAR BIKRAM SINGH.

their consent; that the deed was valid, and that Babu Chandrika Bakhsh Singh had been put in proprietary possession of the taluqa at the time of the execution of the deed, and they prayed to be added as respondents to the appeal. On the 24th of March, 1911, Mahabir Singh and Bachu Singh were by order of the Court of the Judicial Commissioner added as respondents to that appeal.

When the appeal came on for hearing in the Court of the Judicial Commissioner, Raja Indar Bikram Singh, through his counsel, informed the Court that he did not contest the decision of the Subordinate Judge as to the alleged will of 1866, or as to the non-existence of the alleged reversioners, Girdhara Singh and Kalka Singh, or as to the execution of the deed of gift of the 13th of December, 1904, and his counsel confined his contention in opposition to the decree of the Subordinate Judge to an argument that the deed of gift did not represent any genuine transaction, and that Babuain Maharaj Rani had remained in possession, and had no power to confer any valid title upon Babu Chandrika Bakhsh Singh.

The suit was not a suit for the ejectment of a defendant who was in possession, in which the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, it is a suit for a declaration of title by a plaintiff who was and is in possession. The Subordinate Judge had found that Raja Indar Bikram Singh had no title, and when the correctness of that finding was not disputed in the Court of the Judicial Commissioner of Oudh, it should have been apparent to the Judges of that Court, who were hearing the appeal, that as Raja Indar Bikram Singh had failed to prove that he was, even remotely, concerned in the title to Mahgawan and in the right to the proprietary possession of that taluqa, he had no title to protest and no interest which could give him a right to contest the declaration of title which Babu Chandrika Singh had obtained, and that the appeal to that Court should be dismissed. Raja Indar Bikram Singh was a mere impertinent intervener in another person's affair. The Judges who heard the appeal, however, instead of dismissing it, went into a long and, under the

1916

CHANDRIKA BAKHSH SINGH v. INDAR BIKRAM SINGH

circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property, and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Bara Banki restored.

The respondent was ordered to pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers & Nevill.*

J. V. W.

*P.C.**
1916
June, 23.

FATEH CHAND (1st DEFENDANT) v. RUP CHAND (PLAINTIFF). AND ANOTHER APPEAL.

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Will—Construction of will—Will of Hindu widow in possession of her husband's estate—Bequest of whole estate to one person on condition:—Condition containing exception to consequence of entire estate—Bequest of portion of estate to a different legatee—Owner in possession—Malik-o-qabiz—Absolute or limited estate.

A Hindu widow in possession of her husband's estate disposed of it by will as follows:—"Under the will of my husband I am the sole 'owner in possession' of his entire estate and possess all the proprietary powers . . . I bequeath the entire estate of my husband to Fateh Chand . . . subject to the following conditions . . . (1) So long as I live I shall continue to be the 'owner in possession' of the entire estate . . . and possess all the powers such as making sales, mortgages, gift, etc. (2) After my death the said person (the legatee) shall become the 'owner in possession' of the entire estate of my husband, and he, too, shall possess all the powers of alienation like myself. (4) I have bequeathed mauza Khudda with all the property to Musammat Gomi . . . After my death she shall be the 'owner in possession' of the entire property in mauza Khudda aforesaid."

Held (affirming the decision of the High Court) that on the construction of the will the words "owner in possession" (*malig-o-qabiz*) in clause 4, conferred on Musammat Gomi an absolute estate, and that completeness of the ownership and possession was not altered by any other expressions in the will *Surajmani* v. *Rale Nath Opka* (1) followed.

Taking all the clauses of the will together there was no repugnancy in such a construction, for, though the entire estate was conveyed in the first place

**Present*:—Lord SHAW, Lord PARMOOR and Mr AMEER ALI.

(1) (1907) I. L. R. 30 All., 84: L. R., 35 I. A., 17.

to Fateh Chand, it was subject to conditions, one of which (clause 4) bequeathed mauza Khudda as an exception to the conveyance of the entire estate.

CONSOLIDATED Appeals No. 135 of 1915 from two judgements and decrees (5th February, 1913) of the High Court at Allahabad, which partly affirmed and partly reversed a judgement and decree (11th March, 1911) of the Court of the Subordinate Judge of Saharanpur.

These two consolidated appeals arose out of a suit brought by the respondent for possession of a village named Khudda, which the plaintiff alleged belonged to Musammat Gomti Kunwar, widow of Lala Sri Kishan Das; that by her will, dated the 18th of September, 1901, she bequeathed the village to Musammat Gomi, daughter of Shibba, and wife of Suraj Mal; and that Musammat Gomi on the 26th of November, 1908, executed a deed of gift in his favour of part of the village, and on the 3rd of December, 1908, executed a deed of sale to him of the remaining part. The suit was brought against Fateh Chand, the present appellant, and Musammat Gomi was made a *pro forma* defendant. Fateh Chand, who alone contested the suit, admitted that Musammat Gomti made the will, dated the 18th of September, 1901, and that she thereby made a bequest of the village Khudda in favour of one Musammat Gomi, but he alleged that Musammat Gomi, the legatee under the will, was not the daughter of Shibba and wife of Suraj Mal; but another person of the same name; and further that even assuming that Musammat Gomi, the daughter of Shibba and wife of Suraj Mal, was the legatee, the will of Musammat Gomti was subsequently revoked, and her entire property bequeathed to himself, Fateh Chand.

The will of Musammat Gomti Kunwar, who died on the 11th of January, 1908, was, so far as it is material, as follows:—

"Under the will of my husband I am the sole owner in possession of his entire estate and possess all the proprietary powers. I have no male or female issue, and life is uncertain and not everlasting. Hence, through foresight and with a view to avoid future troubles and disputes, I, in a sound state of body and mind, bequeath the entire estate of my husband to Fateh Chand, son of Lala Sri Ram Das, who is related to me as the son of my 'jeth' (husband's elder brother) subject to the following conditions. I covenant in writing that I shall abide by the following conditions:—

"1. So long as I live, I shall continue to be the owner in possession of the entire estate, the subject of the will, and possess all the powers, such as (those of) making sales, mortgages, gifts, etc.

1916

FATEH CHAND v. RUP CHAND

"2. After my death, the said person (the legatee) shall become the owner in possession of the entire estate of my husband and he, too, shall possess all powers of alienation like myself.

"4. I have bequeathed mauza Khudda, with all the property, to Musammat Gomi, the daughter of my priest ('*prohit*') whose marriage was celebrated by my father-in-law and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in mauza Khudda aforesaid."

On the 13th of November, 1902, Musammat Gomti made a deposition in the presence of a Deputy Magistrate of Saharanpur, and stated (*inter alia*) as follows:—

"Fateh Chand should perform my obsequies, and he is the owner on my behalf . . he is the owner of my property, goods, and chattels . . "

The main questions argued in the Lower Courts were—

(1) Whether Musammat Gomi, wife of Suraj Mal, and the plaintiff's vendor, was the real legatee under the will or some other woman of that name? As to that it was found by both Courts in India concurrently on the evidence that the plaintiff's vendor was the real legatee That question therefore was finally decided. Both Courts also held with regard to question (3) as to the alleged revocation of the will that it was not revoked by the deposition made by the testatrix on the 13th of November, 1902 That, though a question of law was also considered settled, and practically the only question for determination on these appeals was—

(2) Whether on the true construction of the will Musammat Gomi was entitled to an absolute estate or only to an estate for life?

The Subordinate Judge answered that question by holding that the legatee took only a life interest in the village Khudda. From the decree of the Subordinate Judge both parties appealed to the High Court, the plaintiff on the ground that he was entitled to an absolute interest, and the defendant contending that the plaintiff took no interest whatever in the village.

The High Court (Sir H. RICHARDS, C. J., and Sir P. C. BANERJI, J.) set aside so much of the Subordinate Judge's decree as in any way limited the estate of the plaintiff in the property in dispute, and held him entitled to an absolute estate

in Khulda. The material portion of the judgement was as follows :—

"The learned Subordinate Judge has, for reasons which he has given in his judgement, held that on the true construction of the will as a whole, Musammat Gomi only took an estate for her life. He lays a good deal of stress upon the words in clause (2) giving all powers of alienation to Fateh Chand and to the omission of words of the same nature in clause (4). He then goes on to say that by reading clause (4) 'as conferring merely a life estate, he can reconcile both clauses of the will.' We cannot agree with this view. Having regard to the recent ruling of their Lordships of the Privy Council (1) if clause (4) stood alone, we certainly would have to hold that Musammat Gomi took an absolute interest, and not merely a life-interest.

"We have then to see whether there is anything else in the will to lead us to believe that merely a life-interest was intended. The case cannot be put more forcibly than it was put by the learned Subordinate Judge. We, however, think that his reasoning is not quite complete, because by interpreting clause (4) as giving merely a life-estate, would not reconcile the two clauses or give effect to clause (2). Clause (2) provides that, after the death of the testatrix, Fateh Chand should at once become the absolute owner in possession of the entire estate. It is impossible to reconcile this clause with clause (4), which undoubtedly gives at least a life-estate to Musammat Gomi. We are bound to consider each clause by itself, and we must hold that under clause (4) an absolute estate is conferred upon Musammat Gomi. There are no words in clause (4), or in any other part of the will save, as already mentioned, which could in any way limit the estate conferred upon Musammat Gomi to a mere life-estate."

The appeal of the plaintiff was consequently allowed and that of the defendant was dismissed.

The defendant appealed from both decrees to His Majesty in Council.

On these appeals—

De Gruyther, K. C., and *J. M. Parikh*, for the appellant, contended that on the construction of the will the decision of the Subordinate Judge was right, and that the legacy on which the claim was based conferred only an estate for life on Musammat Gomi. The language employed by the testatrix in describing her own absolute interest and the absolute interest she intended Fateh Chand to have was different from the terms used by her in conferring the interest she intended to give to Musammat Gomi, from which the presumption was that the latter's interest was meant to be of a limited nature. The word "malik" only

(1) (1907) *Sarajunnissa v. Rahi Nath Opta*, I. L. R., 30 All., 84: L. R., 35 I. A., 17.

1916

FATEH CHAND v. RUP CHAND

conveyed an absolute interest where the terms used did not indicate a more limited estate. Reference was made to *Lalit Mohan Singh Roy* v. *Chukhun Lal Roy* (1); *Surjamani* v. *Rabi Nath Ojha* (2); and *Punchoo Money Dossee* v. *Troylukho Mohiney Dossée* (3). Express words of inheritance, it was submitted, were necessary to convey a larger estate than a woman ordinarily held. A life-interest in mauza Khudda therefore was all that Musammat Gomti conveyed to Fateh Chand.

Sir *W. Garth* and *B. Dube*, for the respondent, were not called on.

1916, June 23rd:—The judgement of their Lordships was delivered by Lord SHAW.—

In these consolidated appeals it has been admitted in the argument submitted to the Board by the counsel for the appellant that substantially only one question falls now to be determined. That question has reference to the construction of a will, dated the 18th of September, 1901, of one Musammat Gomti Kunwar. In that document there is a description of the title of the testatrix given in the following words: "I am the sole owner in possession of his '[her husband's]' entire estate and possess all the proprietary powers." Their Lordships note that throughout this will the term thus translated "sole owner in possession" or "owner in possession" is *malik-o-qabiz*.

Having thus described the property she proceeds to bequeath "the entire estate of my husband to Fateh Chand." There is, however, appended to this bequest of the entire estate the subjection of the whole of the estate "to the following conditions," and a covenant in writing by herself that she would abide by those conditions. One of those conditions is in the following terms:—(4) "I have bequeathed mauza Khudda, with all the property to Musammat Gomi, the daughter of my priest (*prohit*), whose marriage was celebrated by my father-in-law, and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in mauza Khudda aforesaid."

(1) (1887) I. L. R., 24 Calc., 834; L. R., 24 I. A., 76. (2) (1907) I. L. R., 30 All., 54; L. R., 35 I. A., 17

(3) (1884) I. L. R., 10 Calc., 342 (347)

1916

FATEH CHAND v. RUP CHAND.

Their Lordships hold that there can be but little doubt that under the first sentence of condition 4, there would have been a competent bequest of the village Khudda, with the totality of rights falling under the designation "*jumla-i-hakiat*"

Under the second part of condition 4, which says that the village is to be owned in possession, their Lordships cannot hold that there has been any abatement of the force of the words employed. Those words are *malig-o-qabiz* Translated "owner in possession" they truly are "owner and possessor of." There can, according to their Lordships' view of this will, if condition 4 were alone under construction, be therefore no doubt, under either branch of it, that that village now belongs under this will, to Musammat Gomi.

The argument presented to the Board, however, was that while that same form of expression was used in earlier portions of the will, there were appended to it certain conditions or elaborations of which a sample may be given from condition—I. "I shall continue," says that portion of the will, "to be the owner in possession of the entire estate the subject of the will," and then there are added these words "and possess all the powers such as (those of) making sales, mortgages, gifts," etc.

In their Lordships' opinion these expressions do not abate from the completeness of the ownership and possession, nor do they fortify it in any way whatever. Accordingly condition 4, omitting the words which are thus surplusage, has to be given effect to, and it must be given effect to in the full sense recognised by law.

Their Lordships are of opinion that with regard to that sense there is now in the Indian law no doubt whatever The judgement of Lord COLLINS in *Surajmani* v. *Rabi Nath Ojha* (1), attaches to the word *malik-o-qabiz* unquestionably a signification of a full ownership in property. Such an ownership in property in their Lordships' view was thus conveyed in this village to Musammat Gomi, and their Lordships will only conclude these observations by saying that in their view there is no repugnancy in such a construction. It is perfectly true that the entire estate was conveyed in the first place to Fateh Chand,

(1) (1907) I. L. R., 30 All., 84; L. R., 35 I. A., 17.

1916

FATEH CHAND v. RUP CHAND

but it was subject to conditions On a perusal of those conditions, No. 4, occurs to the effect that as an exception from the conveyance of the entire estate this village is conveyed This is not a repugnancy in the proper sense of the term, and taking the clauses of the will together it simply means that Fateh Chand takes the entire estate, with the exception of this village, while it, in proper conveyancing terms, is disposed of in favour of Musammat Gomi

Their Lordships are accordingly of opinion that there is no ground for the argument which would upset the judgement of the learned Judges of the High Court Their Lordships agree with that judgement, and they also agree with the observations made as to the judgement of the Subordinate Judge who, with much care had arrived at a different conclusion. The views of the High Court are shared by this Board, and accordingly they will humbly advise His Majesty that these appeals be dismissed with costs, including the costs of the petition for special leave to appeal.

Appeals dismissed

Solicitors for the appellant : *T L. Wilson & Co.*

Solicitors for the respondent : *Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

1916

April, 3.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

BENI PRASAD AND ANOTHER (DEFENDANTS) *v.* LAJJA RAM (PLAINTIFF)*

Minor—Guardian—Suit to set aside a decree against a minor—Minor properly represented in such suit—Fraud or collusion of guardian.

A decree obtained against an infant properly made a party and properly represented in the case cannot be set aside by means of a separate suit except upon proof of fraud or collusion on the part of the guardian

THE facts of this case are fully set forth in the judgement of the Court.

*Second Appeal No 21 of 1915, from a decree of O. F. Jenkins, District Judge of Agra, dated the 7th of November, 1914, reversing a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 18th of April, 1914.

1915

BENI PRASAD v. LAJJA RAM

Mr. *J. M. Banerji* (with him Babu *Lalit Mohan Banerji*), for the appellants.

Munshi *Narain Prasad Asthana*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.—This appeal arises out of a suit in which the plaintiff, in effect, sought to set aside a decree which had been obtained by one Beni Prasad. Beni Prasad's suit was based on the following allegations. He said that Lajja Ram owed a debt to one Ram Singh, that a creditor of Ram Singh had attached this debt and sold it in execution of a decree obtained against Ram Singh and that he (Beni Prasad) was the auction-purchaser of the debt. At the time that Beni Prasad brought his suit Lajja Ram was "technically" a minor. His mother had been appointed his guardian under the Guardians and Wards Act. On this account the attainment of majority by Lajja Ram was postponed from the period of eighteen years (according to Hindu law), to the special period of twenty-one years prescribed by the Guardians and Wards Act. Beni Prasad accordingly sued Lajja Ram through his certificated guardian who, at the time of the institution of the suit, was the defendant No. 2, one Tikait Narain. The allegation in the plaint in the present suit is that Tikait Narain colluded with Beni Prasad and did not plead limitation, that if limitation had been pleaded, it would have been found that the alleged debt due by Lajja Ram to Ram Singh would have been barred by limitation, that the result of not pleading limitation was that Beni Prasad got a decree. It is this decree which the plaintiff seeks to set aside having now come of age. The court of first instance dismissed the plaintiff's suit. The lower appellate court remanded the case for a finding on certain issues. The first issue was whether the plea of limitation could have been raised. The second issue was whether there had been collusion between Beni Prasad and the minor's guardian. The court found that the plea of limitation might have been raised but that there was no collusion or fraud. On the return of the findings the District Judge granted the plaintiff a decree. He does not in any way find fault with the facts found by the Subordinate Judge upon the issues remanded, but he was of opinion that wherein was shown that the plea of

1916

BENI PRASAD v. LAJJA RAM

limitation might have been raised, the mere fact that it was not raised, entitled the plaintiff to have the decree set aside. No doubt it is possible for a minor, where his guardian has conducted his case with gross negligence, to come to the court and seek relief by way of review of judgement. No doubt also a minor is entitled by a separate suit to set aside a decree that has been obtained against him by fraud. The present proceeding is a separate suit and we entirely agree with the remarks of FIELD, J. in the case of *Raghubar Dayal Sahu* v. *Bhikya Lal* (1). At page 76 the learned Judge says :—" If it be sought to set aside a decree obtained against an infant properly made a party and properly represented in the case and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can only succeed upon proof of fraud or collusion " Let us consider for a moment the facts of the present case. Tikait Narain was the certificated guardian of the minor, that is to say, he was the guardian appointed by the District Judge previous to the institution of the suit and probably on the application of the minor's mother or the minor himself. Lajja Ram was a minor technically only Had it not been for the fact that a guardian had been appointed by the court, he would have reached his full age a considerable time before the institution of the suit. Lajja Ram had property and there was no reason why he himself should not have put forward and instructed the pleader to put forward every plea and every circumstance which would have enabled him successfully to defend the suit brought by Beni Prasad. The allegation against the guardian is that he neglected to plead limitation. There is no evidence of any kind to connect Beni Prasad with the omission of the guardian to plead limitation. Further more the plea of limitation is one to which effect can be given even though not pleaded. The court is bound to give effect to the provisions of the Limitation Act, of its own motion. Therefore, notwithstanding the omission to plead limitation the facts and circumstances could have been given at the trial. In our opinion there was no evidence from which the court could infer collusion on behalf of Beni Prasad. If the view taken by FIELD, J. in the case to which we have referred is

(1) (1885) I. L.R., 12 Calc., 69

correct, this in itself is sufficient ground for dismissing the plaintiff's suit. Even if we were to hold that a minor can avoid a decree by a separate suit solely on the ground of the gross negligence of his guardian, we do not think under the circumstances of this case any such negligence has been established, bearing in mind, in particular, the fact of the age of Lajja Ram, who the learned Subordinate Judge says was a very intelligent young man. We think the view taken by the Subordinate Judge was correct and that his decree should be restored. We accordingly allow the appeal, set aside the decree of the learned District Judge and restore the decree of the court of first instance with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir Pramada Charan Banerji.

EMPEROR v. GHAMMAN AND OTHERS.*

1916
April, 14.

Act (Local) No. X of 1900 (N.-W. P. and Oudh Municipalities Act), section 132 —Breach of rule made under clause (e) of section 130.—Notice.

In order to render a person liable to punishment for breach of a rule made under clause (*e*) of section 130 of the Municipalities Act (Local) I of 1900), by reason of the continuance of sale or exposure for sale of certain specified articles upon any premises which were at the time of the making of such rule used for such purpose it is necessary that six months' notice in writing should have been served upon him in the manner provided by law; and conviction in the absence of such notice is bad in law.

THE facts of this case are fully set forth in the judgement of the Court.

The Assistant Government Advocate, (Mr. *R. Malcomson*), for the Crown.

The opposite parties were not represented.

BANERJI, J.—This case has been referred by the learned Sessions Judge of Budaun with the recommendation that the conviction of the twenty-three accused persons in this case under section 132 of the Municipalities Act, should be set aside and the fines imposed on them refunded. It appears that the Municipal Board of Ujhani made a rule under section 130 of the

1916

EMPEROR v. GHAMMAN

Act, prohibiting the exposure for sale or sale of fruits and vegetables outside the limits of the Municipal market unless the persons so selling, or exposing for sale, obtained and held a licence. The rule was sanctioned by Government and was publicly proclaimed on the spot. The accused persons not having obeyed the rule were prosecuted and convicted and sentenced to different amounts of fine. The learned Sessions Judge is of opinion that they were protected by the proviso to section 130 of the Act, which is to the effect that "no person shall be punishable for breach of any rule made under clause (*a*), or clause (*e*), by reason of the continuance of such manufacture, preparation or exposure for sale or sale, upon any premises which are at the time of the making of such rule used for such purpose, until he has received from the Board six months' notice in writing to discontinue such manufacture, preparation or exposure for sale, or such sale in such premises." Section 143 prescribes the mode in which notice is to be served. It is admitted in the present case that notice was not served on each of the twenty-three accused in the manner laid down in section 143. It was not proved that the accused were doing anything beyond continuing the exposure of their goods for sale or the sale of fruits and vegetables at a place called the *Gandandla*. That was the place according to the Secretary's evidence, where fruits and vegetables were exposed for sale and sold, and the accused apparently were exposing their goods and selling them at that particular place. This was clearly a case in which the accused *continued* the act which they were prohibited from doing by the new rule promulgated by the Municipality. In order to render them liable to punishment for committing such breach, it was necessary that notice should have been served on them in the manner provided by law. As this was not done they were not liable to punishment and are protected by the proviso to section 130 I agree with the view taken by the learned Sessions Judge and accepting his recommendation, I set aside the convictions and sentences and direct that the fines, if paid, be refunded.

Conviction set aside.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. BECHAN PANDE AND OTHERS. *

1916
April, 27.

Joinder of case—Offences of the same kind committed in respect of different persons—Legality of joint trial—Criminal Procedure Code, sections 234, 239—Practice.

The words "offences of the same kind" used in section 234 of the Code of Criminal Procedure, and as defined by sub-clause (2) of the said section, do not imply that the offences should necessarily have been committed against the same person. Where therefore there were six persons accused of having been jointly concerned in carrying on a systematic swindle, and three joint charges were framed against all the accused, *held* that there was nothing illegal in the procedure.

IN this case six persons were jointly tried. The prosecution alleged that the six accused had joined together in working a scheme for swindling the public by means of false advertisements. They published advertisements in a newspaper, styling themselves as a Trading Company of Benares City, offering to supply the public with silk and watches on certain terms. Several individuals were induced by the advertisement to send money to them, and instead of the silk and watches advertised they received parcels containing Indian corn cobs. The men were caught and tried together at the same trial. Three such instances of cheating, occurring within one year, were selected, the three individuals cheated being residents of different places; and a charge of cheating under section 420, Indian Penal Code, was framed against each of the accused in respect of each of these three counts.* There was no charge of criminal conspiracy The trying Magistrate found each count proved against each accused and sentenced them to various terms of imprisonment. On appeal the Sessions Judge, relying principally on *Empress* v. *Murari* (1) and *Queen Empress* v. *Jwala Prasad* (2) held that the trial was vitiated by an illegal joinder of charges; and without entering into the merits of the case set aside the convictions and sentences and directed a re-trial according to law. Against this order the Local Government applied in revision to the High Court.

* Criminal Revision No. 196 of 1916, by the Local Government, from an order of E. M. Nanavutty, Sessions Judge of Benares, dated the 1st of February, 1916.

(1) (1881) I. L. R., 4 All., 147. (2) (1884) I. L. R., 7 All., 174.

1916

EMPEROR v. BECHAN PANDE.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

Section 234 of the Code of Criminal Procedure sanctions a joint trial for offences of the same kind in cases like the present. That section does not lay down that the offences of the same kind must have been committed against the same individual. The ruling in I. L. R., 4 All., 147, was under the old Code of 1872, and is a mere *ipse dixit*. Mr. Justice STRAIGHT was probably thinking of the English Act. But the Indian Legislature has left out the words "committed against the same person." The case of *Subedar Ahir* v. *Emperor*, (1) lays down the correct law and reviews all the cases on the point. He also referred to Cr. R. *No. 195 of 1916.

*Judgement in Cr. R. No. 195 of 1916.

PIGGOTT, J.—In this case one Jugardeo was tried at one trial in respect of two acts of theft committed in the course of the same night It was alleged that he stole *bajra* from one man's field and rice from the field of another. He appealed to the court of Session, and there the learned Sessions Judge, holding that the trial was illegal, has directed him to be retried. The case has been brought to our notice and we have taken up the matter in the exercise of our revisional jurisdiction It is said that there is authority of this Court in favour of the view taken by the learned Sessions Judge. The case of *Empress* v. *Murari*, (2) was decided on a differently worded section of the Criminal Procedure Code of 1872. If it is necessary to say so, we are quite prepared to say that that decision should no longer be regarded as laying down the law as it stands under the Criminal Procedure Code at present in force. The learned Sessions Judge seems to have appreciated this point, but to have been of opinion that the decision in *Empress* v. *Murari* (2) was re-affirmed in the case of *Queen-Empress* v. *Jwala Prasad* (3).

It was remarked at the close of that judgement that the decision in *Empress* v. *Murari* (2) was under a different statute and would not be affected by the decision then being pronounced. It seems to us that, so far from the learned Judge's desiring to lay it down that the decision in *Empress* v. *Murari* (2) was a correct exposition of the law as it stood under the Criminal Procedure Code of 1882, they suggested the contrary. At any rate nothing was decided in the Full Bench case of *Queen-Empress* v. *Jwala Prasad* (3) with regard to the meaning or effect of the expression "offences of the same kind" as used in section 234 of the Criminal Procedure Code, and as defined by sub-clause (2) of the said section. Taking these words into our consideration it seems clear to us that the "offences of the same kind" referred to in that section need not necessarily have been committed against the same person. This principle has recently been affirmed by the Calcutta High Court in *Subedar Ahir* v. *Emperor* (1) after an exhaustive review of previous authorities.

(1) (1915) I. L. R., 43 Calc., 13. (2) (1881) I. L. R., 4 All., 147.
(3) (1884) I. L. R., 7 All., 174.

1916

EMPEROR v. BECHAN PANDE.

Babu *Satya Chandra Mukerji*, for the accused.

The joint trial for three distinct offences committed against three different individuals was illegal; *Empress* v. *Murari* (1)

That ruling was considered in the Full Bench case of *Queen-Empress* v. *Jwala Prasad* (2); and it was expressly stated therein that the decision in the former case "will be unaffected" by that in the latter. In the Full Bench case a post master was charged with, and tried at one trial for embezzlement of three separate sums of money handed over to him by different individuals for remittance by Postal Money Order. But it was held that as soon as the amounts were paid in at the Post Office they ceased to belong to the persons who paid them and became Government property, and so the offences were really against the same person. If the Full Bench had meant to lay down generally that section 234 of the Code of Criminal Procedure, then in force (which is identical with the present section 234) was not limited to the case of offences committed against the same person they would not have expressed the reservation in favour of the decision in I. L. R., 4 All., 147. The Full Bench ruling in effect left the earlier case intact in cases where the circumstance that the offences were really against the same individual did not exist. The difference between the language of the present section 234, and the corresponding section of the Code of 1872, is not such as to warrant, of itself, the abrogation of the ruling in I. L. R., 4 All., 147.

Then, in the present case, six persons have been jointly tried, each for three distinct offences. Such a joint trial is improper and the accused are likely to be prejudiced thereby.

PIGGOTT and WALSH, JJ.:—In this case six men were placed on their trial before a Magistrate of the first class at Benares, the allegations against them being that they had been jointly concerned

WALSH, J.—I agree *Empress* v. *Murari* (1) was decided directly in face of the clear definition and exposition contained in the section itself. It must be regarded as no longer law." The point which is now before us and which is the only point reported in the head-note was not the point on which the case came up The opinion of Mr Justice STRAIGHT was merely an *obiter dictum* apparently without examination of the section with which he was dealing It was a statement of the English Law. In that particular case the court enhanced the sentence against the man with regard to whom it was suggested that there was irregularity, so that the report has no weight as an authority.

(1) (1881) I. L. R., 4 All., 147. (2) (1886) I. L. R., 7 All., 174.

1916

EMPEROR v. BECHAN PANDE.

in carrying on a systematic swindle in the course of which they had committed sundry offences punishable under section 420 of the Indian Penal Code Three of these offences committed in the course of a single year (as a matter of fact in the course of a much narrower interval) were selected, and the prosecution was limited to these. The Joint Magistrate framed three charges each against the entire body of accused, and he proceeded to try all of them at one and the same trial in respect of all these offences, found all the accused guilty, and passed what he considered appropriate sentences Four of the persons convicted appealed to the Sessions Judge, who has held the trial in the Magistrate's court to be bad in law He has accordingly ordered a re-trial of the whole body of accused separately on each of the three charges, and he has done this without entering into the merits of the case at all and without recording, or apparently forming, any opinion that the accused had been prejudiced, or that the interests of justice had suffered by the course adopted in the Magistrate's Court. On the question of law involved we have expressed our opinion in a case which has just come before us in which the question as to the operation of section 234 of the Code of Criminal Procedure, was raised in a singularly crude and simple form (1). In the present case it is suggested that the question is complicated by the fact that six persons in all were involved in each of the three charges. The provisions of section 233, and the following sections of the Criminal Procedure Code require to be considered together. They occur in a sub-division of the Code headed "joinder of charges." The general principle that there shall be a separate charge and a separate trial for every distinct offence of which any person is accused is first laid down in section 233 of the Code. Then follow a number of sections specifying possible exceptions. In these sections, where a court is empowered to try offences jointly or accused persons jointly the word "may" is used in each case, and not the word "shall" as used in section 233, where the general principle is laid down. These are therefore empowering sections, which require to be used with due discretion and in suitable cases. In the present case the prosecution set out to prove that the six accused

(1) Cr. R. No. 195 of 1916 *(Supra)*.

persons, acting together, had committed each of the three offences specified in the several charges. On the wording of the section there was nothing illegal in the framing of the three joint charges against all the accused, or in the trial of these three charges at one and the same trial. If the learned Sessions Judge, on examining the record, comes to the conclusion that the accused persons, or any of them, were prejudiced, or that the interests of justice have suffered by the procedure adopted in the Magistrate's Court, it will still be open to him to order such new trial or trials as he may consider that the interests of justice require. We think he was wrong in holding himself bound by the view he took of certain older decisions of this Court to quash the whole of the convictions and direct the re-trial of all the accused on all the charges, on the one ground taken by him, namely, that the trial as held in the Magistrate's Court was absolutely illegal. We therefore set aside the order passed by the Sessions Judge in this matter and direct him to re-admit the appeals of Bechan Pande, Sat Narain Pande, Anrudh Prasad, and Ram Shankar on to his file of pending appeals and dispose of the same according to law with regard to the remarks that have been made above.

Order set aside.

APPELLATE CIVIL.

1916
May, 3.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

PARAM HANS AND OTHERS (DEFENDANTS) *v.* RANDHIR SINGH (PLAINTIFF) AND SAHODRA (DEFENDANT)*

Act No IV *of* 1882 (*Transfer of Property Act*), *section* 59—*Attestation*—*Document attested by one witness only*—*Mortgage*—*Charge.*

A document purporting to be a deed of mortgage bore the signature of one attesting witness; and the name of another person was written on the margin by the scribe, but there was no signature or mark made by this second person. In a suit brought upon the document after his death it was *held* that the document was not duly attested by two witnesses within the meaning of section 59 of the Transfer of Property Act, inasmuch as there was nothing to show that the person whose name appeared on the document as an attesting witness had authorised the scribe to sign it for him and therefore it could neither operate as a mortgage nor create a charge on immoveable property.

* First Appeal No. 176 of 1915, from an order of Abdul Ali, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Agra, dated the 23rd of September, 1915.

1916

PARAM HANS v. RANDHIR SINGH.

THE facts of this case were as follows :—

Defendant No 1 Musammat Subhadra executed the mortgage deed in suit in 1908. Subsequently she transferred the equity of redemption to one Param Hans and defendants Nos. 2 and 3.

In a suit for sale instituted by the mortgagees, Musammat Subhadra admitted execution and receipt of consideration The appellants transferees contested the suit It appeared that there were only two marginal witnesses, Bansi and Gopal, the former of whom had neither signed the deed nor made his mark or thumb impression. His name was written on his behalf by the scribe of the deed. The Munsif held that this was not sufficient attestation and dismissed the suit.

The lower appellate court reversed the decree and remanded the case under Order XLI, rule 23, Civil Procedure Code.

The transferees-defendants appealed to the High Court from his order of remand.

Babu *Narain Prasad Asthana*, for the appellants, contended that the deed was not properly attested, as there was nothing to show that the scribe had been authorised by Bansi to put his signature, and Bansi himself had made no mark or put his thumb impression. The requirements of the law were not satisfied.

[He was stopped.]

Mr. *J. M. Banerji* (Babu *Lalit Mohan Banerji* with him), for the respondent.

The execution of the mortgage deed is admitted by the predecessor-in-title of the appellant, namely, the executant herself. The appellants purchased the equity of redemption with full knowledge of the mortgage and it would be iniquitous to allow them to go behind the admission of their predecessor-in-title.

[WALSH, J.—If she had admitted the execution before the transfer it might have been binding on the tranferees, but her admission after she has lost all interest in the property does not bind them.]

The appellants do not allege fraud or collusion.

The execution of the mortgage deed has been proved and the attestation is proper inasmuch as out of two marginal witnesses one is dead and the other swears that the Musammat affixed her mark to the document in the presence of both the witnesses.

[SUNDAR LAL, J.—Bansi neither signed the deed nor affixed his mark or thumb impression to it and you have not proved that he, in any way, authorised the scribe to sign on his behalf.]

I submit that his authority should be presumed.

[SUNDAR LAL, J.— Referred to *Ram Bahadur* v. *Ajodhia Singh* (Patna High Court) (1).]

In any case the mortgagee is entitled to a simple money decree against the executant herself.

Babu *Narain Prasad Asthana* for the appellant, was not heard in reply.

SUNDAR LAL, J.—This is a suit upon a deed which purports to be a deed of mortgage, dated the 17th of July, 1908. The document bears the signature and mark of Musammat Subhadra the executant. It bears the signature of one Gopal, an attesting witness, and the only other witness whose name is written by the scribe is Bansi. In the margin of the deed is given the name of another witness or a person who was expected to be an attesting witness, who is described as Bansi "son of Randhir, caste Gola purab, resident of Sanjan, by acknowledgement of the executant." This is written in the hand-writing of the scribe. There is no signature or mark of this witness Bansi on the deed He is dead, and there is nothing to show that he authorized the scribe to sign his name for him. He has not himself put his signature or mark. The question is whether he is an attesting witness within the meaning of section 59 of the Transfer of Property Act. In a recent case which came before the Patna High Court, *Ram Bahadur* v. *Ajodhia Singh* (1), Chief Justice CHAMIER and Mr. Justice JWALA PRASAD came to the conclusion that to be an attesting witness within the meaning of section 59

(1) (1914) 20 C. W. N. 699.

1916

ARAN HANS v. RANDHIR SINGH.

of the Transfer of Property Act, the witness must not only have seen the execution of the document but should have also subscribed as a witness, that is, he must have put his own mark or signature to it. It may be that in the present case the scribe wrote up what he found in the draft of the deed with the intention of subsequently obtaining the signature or mark of Bansi on the acknowledgement of the executant, as before the Privy Council ruling in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1), witnessing a document on the mere acknowledgement of the executant was regarded as sufficient by this Court. In our opinion in the absence of proof that the scribe was authorised by Bansi to sign for him as an attesting witness or to put his mark or signature to the document on his behalf as a witness, the document has not been duly attested by at least two witnesses and is not a valid mortgage according to the aforesaid Privy Council ruling. We think that the document cannot operate as a mortgage as against the transferee of the property. It creates no charge as has been recently ruled by a Full Bench of this Court in *The Collector of Mirzapur* v. *Bhagwan Prasad* (2). The suit for sale of the property therefore fails. It is, however, a suit upon a registered document and has been brought within six years from the date of the cause of action The plaintiff is entitled to a money decree against Musammat Subhadra. We therefore vary the decree of the court below by dismissing the suit for sale and making a money decree for the claim against Musammat Subhadra with costs.

WALSH, J.—It is as well to add a caution against treating an important question like this, namely, as to whether an alleged attestation or execution is genuine or not, in the way in which it has been treated by the court below. That court has assumed in favour of the document that a witness who was actually called before the court must have seen the alleged executant touch the pen of the scribe as an authority to sign for him although there is not a scintilla of evidence on the point.

(1) (1912) I. L. R., 35 Mad., 607. (2) (1913) I. L. R., 35 All., 154.

BY THE COURT.—We allow the appeal of the transferee with costs, but amend the decree of the court below by making a decree for money against Musammat Subhadra with costs

1916

PARAM HANS v RANDHIR SINGH.

Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Walsh and Mr Justice Sundar Lal.

GANGA PRASAD (PETITIONER) v HAR NARAIN (OPPOSITE PARTY.)*

1916 *May*, 11.

Act (Local) No II of 1901 (Agra Tenancy Act), sections 58 and 177 (e) — Suit for ejectment—Question of proprietary title—Appeal—Jurisdiction

In a suit for ejectment under section 58 of the Tenancy Act, the defendant denied the plaintiff's title and set up another man as his landlord The court of first instance decreed the claim.

Held, that an appeal from this decision lay to the District Judge under section 177 (e) of the Act, inasmuch as the question of the plaintiff's proprietary title was put in issue in the court of first instance and was a matter in issue in the appeal.

THE facts of this case are fully set forth in the judgement of the Court.

The petitioner was not represented.

Munshi *Lakshmi Narain*, for the opposite party

SUNDAR LAL, J.—This is a reference under section 195 of Act II of 1901 (United Provinces), made by the District Judge of Budaun, under the following circumstances :—

The plaintiff Har Narain avers that he is the zamindar and owner of two plots of land Nos. $\frac{1}{7}$ and $\frac{6}{7}$ in patti Muhammad Ali in *mahal* Altaf Husain of mauza Ganaur of which the defendant Inderman is a non-occupancy tenant under the plaintiff He sues for the ejectment of the said defendant under section 58 of Act II of 1901 (United Provinces). The second defendant to the suit is one Ganga Prasad *alias* Gangola, who, according to the plaint, is colluding with defendant No. 1 and has been put in possession of the said land by the defendant No. 1. Under section 64 of the Agra Tenancy Act (II of 1901), in all suits for ejectment any person in possession claiming through the tenant may be joined as a party to the suit. Ganga Prasad *alias*

* Civil Miscellaneous No 62 of 1916.

1916

GANGA PRASAD v. HAR NARAIN.

Gangola was therefore properly made a party to the suit on the allegations made in the plaint.

Inderman filed a written statement disclaiming all interest as a tenant in the land in suit. The second defendant Ganga Prasad, *alias* Gangola, has defended the suit on the ground that he is in possession of plot No $\frac{47}{9}$ as a tenant of one Sheo Prasad (who is alleged to be the real zamindar and owner of the land), under a registered lease, dated the 27th of April, 1914, granted by Sheo Prasad aforesaid for a term of nine years. As to the other plot (No. $\frac{42}{9}$), the defendant alleges that it is in the possession of Sheo Prasad aforesaid. It is not clear what exact interest Sheo Prasad had in the land, but it appears that in 1914, the plaintiff Har Narain had sued Inderman and Sheo Prasad for the recovery of rent due to him from the defendant Inderman. That suit was decreed in appeal by the Collector by a judgement, dated the 24th of July, 1914 Sheo Prasad's pretensions to the land seem to have been disregarded by the Collector. It was during the pendency of that suit that the lease relied upon by the defendant was granted by Sheo Prasad. The court of first instance in this case has held that the plaintiff was the real owner of the land in suit and that Inderman was a tenant of the plaintiff. It has decreed the claim.

The defendant Ganga Prasad, *alias* Gangola, preferred an appeal against the said decree in so far as it relates to plot no. $\frac{47}{9}$. The appeal was in the first instance filed by him in the court of the Commissioner. That officer, however, returned the memorandum of appeal for presentation to the proper court on the ground that no appeal lay to him The defendant then filed the memorandum of appeal in the court of the District Judge, who is of opinion that the appeal really lay to the Commissioner and not to him, but in view of the fact that the Commissioner has already refused to entertain the appeal for want of jurisdiction the learned Judge has made this reference to this Court for the determination of the question to which court the appeal lies in law.

The suit is really one under section 58 of the Agra Tenancy Act, and falls in Group "C" of the Fourth Schedule to that Act. Under section 179 of the said Act, an appeal lies to the

1916

GANGA PRASAD v. HAR NARAIN.

Commissioner from the decree of the Assistant Collector unless by some other section of the Act an appeal is given in any case to another court. Section 177 of the Act gives an appeal to the court of the District Judge "in all suits in which (*c*) a question of proprietary title has been at issue in the court of first instance and is a matter in issue in the appeal." The defence of Ganga Prasad, *alias* Gangola, in the suit is that the plaintiff is not the owner of the land in suit, but one Sheo Prasad under whom the defendants claim. The question of plaintiff's proprietary title to the land was thus put in issue in the court of first instance and is a matter in issue in the appeal. In the case of the *Maharaja of Benares* v. *Baldeo Prasad* (1). the tenant in a suit for the assessment of rent denied the title of the plaintiff to the land in suit in that case and urged that the Maharaja of Benares was the real owner of the land. The Maharaja was added as a defendant to the suit. The court of first instance decided in favour of the plaintiff. The Maharaja appealed against the said decree to the court of the District Judge, who allowed the appeal. On appeal to this Court Mr. Justice GRIFFIN held that no appeal lay to the District Judge. On appeal under the Letters Patent, the learned Chief Justice Sir JOHN STANLEY and Mr. Justice BANERJI held that under section 177 (*c*) of the Agra Tenancy Act, the appeal to the District Judge was rightly preferred by the Maharaja. The point referred to us is concluded by the decision in this case. There is another case reported at page 1198 of the seventh volume of the Allahabad Law Journal, which takes the same view and points out that section 193 of Act II of 1901, does not apply to the circumstances of this case, but the learned Judge has distinguished that case on the ground that the person whose title was set up by the defendant was made a party to the suit, and it therefore became possible to adjudicate upon the question of proprietary title against the said person. In this case Sheo Prasad is certainly not made party to the suit, and any adjudication made in this case on the question of the proprietary title to the land in suit would not be binding upon him. It would, however, all the same be binding upon the second defendant who has raised

(1) (1911) 8 A. L. J., 36.

1916

GANGA PRASAD v. HAR NARAIN

the question and a final decision as against him can be made in this case. The second defendant, who was not the tenant of the plaintiff, was competent in law to deny the plaintiff's title and the court was bound to adjudicate upon the question thus raised by him. The ruling of the Board of Revenue in the case of *Adya Saran Singh* v. *Thakur* (1), in our opinion correctly lays down the law upon this point. Our reply to the reference is that an appeal lies to the court of the District Judge, who is directed to entertain the appeal and proceed to hear and dispose of the same according to law. The costs of the reference will be costs in the cause.

WALSH, J.—I agree.

REVISIONAL CRIMINAL.

1916
May, 12.

Before Mr Justice Walsh

EMPEROR v SHAMBHU NATH AND OTHERS *

Security for keeping the peace—Criminal Procedure Code, section 107—Nature and quantum of evidence necessary before passing order for security.

There must be definite evidence in the case of any and every person charged under section 107 of the Code of Criminal Procedure, that there is danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that they are indulging in feelings of hostility towards another body of persons. *Queen-Empress* v. *Abdul Kadir* (2) referred to.

Mr *Nehal Chand* and Babu *Baleshri Prasad*, for the applicants.

Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

The facts of this case are fully set forth in the judgement of the Court.

WALSH, J.—In this case I am content to rest my judgement on the decision in *Queen-Empress* v. *Abdul Kadir* (2). There must be definite evidence in the case of any and every person charged under this section that there is a danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that

* Criminal Revision No 217 of 1916, from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 18th of December, 1915.

(1) 31 I. C., 853 (2) (1886) I. L. R., 9 All., 452

they are indulging in feelings of hostility towards another body of persons. Man is a gregarious animal and apt to associate himself with friends, and, when he has got nothing else to do, to indulge his feelings of hostility towards his rival and his friends. These feelings are very much to be deplored; but they do not entitle a Magistrate to make orders wholesale under this section.

1916

EMPEROR v. SHAMBHU NATH

Order set aside.

APPELLATE CIVIL.

1916
May, 12.

Before Mr. Justice Piggott and Mr. Justice Lindsay.

GANGA DAHAL RAI AND ANOTHER (DEFENDANTS) v. MUSAMMAT GAURA (PLAINTIFF) *

Civil Procedure Code (1908), *Order XXXIII, rules* 10 *and* 11—*Stamp duty on a pauper's plaint—Decree for less than the amount claimed*

In a suit brought *in forma pauperis*, the plaintiff succeeded only in part and failed as to the rest of the claim, the lower court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of court-fees which would have been payable on the plaint. *Held*, that the court-fees payable on the plaint should be apportioned under the provisions of rules 10 and 11 of Order XXXIII of the Code of Civil Procedure. *Chandrake* v. *Secretary of State for India*, (1) followed.

THE facts of this case were as follows:—

The plaintiff, a Hindu widow, brought a suit *in forma pauperis* for enforcement of her right of maintenance and for recovery of certain gold ornaments. She claimed maintenance at the rate of Rs. 40 per mensem and she valued the ornaments at Rs 3!0. The court-fee which would be payable on the claim if it were not brought *in forma pauperis* was Rs. 264-8-0. The defendants totally denied the relationship upon which the plaintiff based her claim for maintenance. The court found this relationship proved, but held that the plaintiff had failed to establish her claim to the ornaments, and that having regard to the means of the defendants the rate at which the maintenance was claimed was excessive. The court gave the plaintiff a decree for maintenance at Rs 5 per mensem only, but directed the defendants to bear the costs actually incurred by the plaintiff, and further

* First Appeal No 88 of 1916, from a decree of Jotindra Mohan Basu, Subordinate Judge of Basti, dated the 16th of January, 1915.

(1) (1890) I. L. R., 14 Mad., 168.

1916

GANGA DAHAL RAI v. MUSAMMAT GAURA.

directed that the Collector should realise from the defendants the sum of Rs. 264-8-0, on account of court-fees payable on the claim.

The defendants appealed to the High Court.

Dr. *Surendra Nath Sen* (with him Munshi *Lakshmi Narain*), for the appellants.

The order of the lower court directing the defendants to bear the whole costs of the claim is improper, especially that portion of the order which renders the defendants liable for the payment of Rs. 264-8-0 as court-fees. By far the greater portion of the plaintiff's claim has failed, she has succeeded to the extent of only a very small fraction of her claim which was greatly exaggerated. Under these circumstances the court should have passed, in respect of the court-fees, an order under Order XXXIII, rule 11, of the Civil Procedure Code. At all events the court should not have burdened the defendants with any greater share of the court-fees than what is proportionate to the extent of the plaintiff's success.

Reference was made to *Chandraka* v. *Secretary of State*, (1).

Otherwise, there would be no check to a pauper grossly and recklessly exaggerating his claim and thereby penalising the defendants with the payment of the whole of the court-fees payable on such inflated claim. The only equitable rule is to apportion the court-fees among the parties in proportion to their success and failure.

Mr. *Jawaharlal Nehru*, for the respondent.

There can be no hard and fast rule as to the apportionment of the costs between the parties. It is a matter which is within the discretion of the court. The plaintiff having succeeded, although, partially, in the suit, Order XXIII, rule 10, applies to the case. That rule says that the court-fees shall be recoverable from any party ordered by the decree to pay the same. It impliedly if not expressly, leaves it to the discretion of the court to order which of the parties is to pay the court-fees. Where the pauper entirely fails in the suit, rule 11 leaves no option or room for discretion, it directs that the court-fees must be paid by the plaintiff. In the present case, in view of the fact that the defendants denied even the existence of any relationship

(1) (1890) I. L. R., 14 Mad., 163.

and thus cast a slur upon the character of the lady, the court rightly exercised the discretion allowed it under Order XXXIII, rule 10, in burdening the defendants with the whole of the court-fees. In the present case it cannot be said that there was any reckless or *mala fide* exaggeration of the claim, for the plaintiff was not in a position to be able to correctly judge the financial position of the family.

The ruling in I. L. R., 14 Mad., 163, does not say that in all cases of partial success of a pauper suit the court-fees must necessarily be apportioned according to success and failure of the parties. The circumstances of that case were peculiar.

Further, it would be very hard upon the plaintiff, who has got a decree for a monthly allowance of Rs. 5 only, to be burdened with the payment of Rs. 219-8-0 for court-fees.

Dr. *Surendra Nath Sen*, replied.

PIGGOTT and LINDSAY, JJ. :—The plaintiff in the suit out of which this appeal arises was a Hindu widow seeking to enforce her right of maintenance against the surviving members of the joint family to which her late husband had belonged. She claimed at the rate of Rs. 40 per mensem, and she added a further claim in respect of gold ornaments valued at Rs. 300, said to be her property in the hands of the defendants. She was met by a denial of the relationship on which her claim was based. In the opinion of the learned Subordinate Judge, she succeeded in proving that relationship She failed to support her claim in respect of the gold ornaments by any reliable evidence, and with regard to the amount of the maintenance claimed by her, the court below held, that her claim was altogether excessive in view of the evidence as to the means possessed by the defendants. In the result the learned Subordinate Judge gave the plaintiff a decree for maintenance at the rate of Rs. 5 per mensem and dismissed the rest of her claim. The appeal before us is by the defendants. The first two paragraphs of the memorandum of appeal challenge the findings of fact on which the decree in favour of the plaintiff is based. It has been frankly conceded before us in argument that, in view of the evidence led in the court below, and accepted as true by the learned Subordinate Judge, these pleas cannot be pressed. A third plea in the memorandum of appeal before

1916

GANGA PAHAL RAI v. MUSAMMAT GAURA

us assails the order of the court below on the question of costs, and this deserves consideration. It is apparent from the facts already stated that on a mere paper estimate of the value of the claim as brought and the amount of the claim decreed the plaintiff has succeeded only to a comparatively small extent. Nevertheless she has succeeded in proving her case against the defendants on the principal issue of fact involved. The learned Subordinate Judge was therefore of opinion that this was a case in which costs could not be apportioned strictly in accordance with the result of the litigation. He has, however, carried this principle very far in favour of the plaintiff by laying the entire costs of the suit on the defendants. It is to be noticed further that this is not a case which merely raises the question of the discretion of a court in the matter of apportionment of costs. The fact is that the plaintiff sued as a pauper under the provisions of Order XXXIII of the Code of Civil Procedure, and the costs of the court-fee stamp which would have been payable on the plaint require to be apportioned under the provisions of rules 10 and 11 of the aforesaid order. The learned Subordinate Judge has directed the defendants to bear the costs actually incurred by the plaintiff in the litigation, and he has added a direction, purporting to be made under Order XXXIII, rule 11, of the Code of Civil Procedure, to the effect that a sum of Rs. 264-8-0 being the amount of the court-fee which would have been payable on the plaint, shall be realised by the Collector of the district from the defendants. It is this portion of the order which is principally challenged in the present appeal.

Under rule 10 of Order XXXIII of the Code of Civil Procedure, the Legislature deals with the case of a pauper plaintiff who succeeds in the suit and under rule 11, with the case of a pauper plaintiff who fails in the suit. There is no separate provision for a case like the present, in which a pauper plaintiff has partly succeeded and partly failed. Presumably the court is intended to deal with such a case by combining the provisions of the two rules. In the case somewhat similar to the present, *Chandraka v. Secretary of State for India* (1), the learned Judges of the Madras High Court held, under the analogous provisions of the

(1) (1890) I. L. R., 14 Mad., 163.

former Civil Procedure Code (Act XIV of 1882), that it was illegal to lay upon the defendant in such a suit a larger proportion of the court-fee leviable from the plaintiff than would have been payable by the said plaintiff if the claim had been limited originally to that portion which was successful. On this principle the correct order in the present case would be that a sum of Rs. 45 on account of the court-fee stamp will be realisable from the defendants in the manner directed by the court below, and that the balance of Rs. 219-8-0 is recoverable from the plaintiff under the provisions of Order XXXIII, rule 10. The question of the discretion of the court in dealing with a matter of this sort, *i.e.*, with a case in which a pauper plaintiff has partially succeeded and partially failed, is perhaps one which deserves to be dealt with by a special rule. But certainly, on the provisions of Order XXXIII, rules 10 and 11, of the Code of Civil Procedure as they stand, it is difficult to arrive at any conclusion other than that laid down by the Madras High Court, without some apparent straining of the language of the rules.

With regard to the equities of the case there is this much to be said.—In an ordinary litigation the defendant has some protection against any extravagant exaggeration of his claim on the part of a plaintiff who knows that he has a good case for some relief, in the fact that the plaintiff is bound to pay out of his own pocket in the first instance the whole of the court-fee leviable on the plaint as drafted. It is otherwise in the case of a suit brought by a pauper plaintiff, and it would not be equitable to permit such a plaintiff to penalise the defendant by exaggerating his claim. The present case illustrates this principle to a certain extent, and it would be still more obvious if the plaintiff had claimed maintenance at the rate of, say Rs. 400, instead of Rs. 40 per mensem. The injustice in such case of laying the entire burden of the court-fee on the defendant would be apparent. We think therefore that the proper way to deal with the present case is to follow the principle laid down by the Madras High Court in the case already quoted. We accordingly modify the order of the court below on the question of court-fees. We direct that a sum of Rs. 45 be recoverable from the defendants as directed by the court below, and with regard to the balance of Rs. 219-8-0, we

1916

GANGA DAMAL RAI v. MUSAMMAT GAURA.

can only deal with the same in the manner laid down by Order XXXIII, rule 10, of the Code of Civil Procedure, that is to say, we must make a formal order that this sum is recoverable by the Government from the plaintiff, and is the first charge on the subject matter of the suit, that is to say, on the annuity which has been decreed in favour of the plaintiff. We must leave it to the proper authorities to consider whether the interests of Government require that it should stand on its extreme rights in a matter of this sort. After all no actual loss has been suffered by Government by reason of the plaintiff's over-estimate of her claim and it will no doubt receive due consideration in the proper quarter whether it is equitable to insist upon realising this sum out of the small pittance decreed in favour of the plaintiff. We accordingly allow this appeal to the extent stated and otherwise dismiss it. We leave the parties to bear their own costs in this Court.

Decree modified.

1916

May, 13

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

GOSWAMI SRI RAMAN LALJI AND ANOTHER (JUDGEMENT-DEBTORS) *v.* HARI DAS (DECREE-HOLDER)*.

Act No. VII of 1889 *(Succession Certificate Act), section 4—Letters of administration—Assignment of debt by holder of letters of administration of debt covered by the certificate—Rights of assignee.*

A decree for possession of certain property and for mesne profits was passed in favour of *A* and his wife. The wife died after the date of the decree *A* obtained letters of administration in respect of the estate of his wife, and then transferred his own rights under the decree, as also those of his wife to *H*. *H* applied for execution of the decree. The judgement-debtors objected, *inter alia*, that the decree could not be executed without letters of administration or a succession certificate being obtained by the transferee.

Held that *H* could execute the decree without taking out fresh letters of administration.

Per WALSH, J.—A person claiming as an assignee of a debt which was due to the estate of a deceased person is not claiming "the effects of the deceased." From the date of assignment, the debt due to the deceased ceases to be part of the deceased's effects.

The claim contemplated by sub-section 1 of section 4 of the Succession Certificate Act is a claim made by a person in the capacity of, and as a personal representative of a deceased person

*First Appeal No. 182 of 1915, from a decree of E. C. Forbes, Subordinate Judge of Muttra, dated the 30th of April, 1915

1916

GOSWAMI SRI RAMAN LALJI v. HARI DAS

Per SUNDAR LAL, J.—An inquiry as to the validity of transfers made by a certificate-holder is foreign to the scope and object of Act VII of 1889

THE facts of this appeal are as follows :—

A decree for possession and mesne profits was passed in favour of Seth Amar Chand and his wife, Gulab Bai. The latter died and the former transferred his rights, as also the rights of Gulab Bai, under the decree, to the respondent Hari Das Subsequent to the transfer, Amar Chand obtained letters of administration to the estate of Gulab Bai from the High Court at Bombay. Hari Das applied for execution of the decree and the appellant judgement-debtor pleaded, *inter alia*, that he was not entitled to execute the decree unless he produced a grant of letters of administration or a succession certificate to him. The court below held that as Amar Chand had no objection, Hari Das could execute the decree.

The judgement-debtor appealed.

Babu *Piari Lal Banerji* (with whom Babu *Durga Charan Banerji*), for the appellant.

Under section 4 of the Succession Certificate Act, no court shall pass an order for execution of a decree in favour of a person claiming to be entitled to the interest of a deceased decree-holder, unless the person claiming produces a grant of letters of administration *to him* or a succession certificate. The words *to him* were significant and showed that a grant of letters of administration to any other person will not do. The letters of administration granted to Amar Chand would entitle him to apply to execute the decree in favour of Gulab Bai, but it would not entitle his transferee to rely upon the same grant The right of Gulab Bai might have been transferred legally by Amar Chand to Hari Das, but before the latter could apply for execution he would have to produce a grant to himself of letters of administration or a succession certificate. Amar Chand could not transfer the grant to him which was personal.

This point was expressly decided in *Allah Dad Khan* v. *Sant Ram* (1).

The later case of *Rang Lal* v. *Annu Lal*, (2) distinguishes the earlier case and notes that it is competent for a person to transfer

(1) (1912) I. L. R., 35 Calc., 76. (2) (1913) I. L. R., 36 All., 21.

1916

GOSWAMI SRI RAMAN LALJI v. HARI DAS.

a debt. It is not denied that Amar Chand could transfer the decree, but the point is that his transferee could not obtain execution unless he produced the grant required by the Succession Certificate Act.

[SUNDAR LAL, J.—The decree was one for damages—could damages be called a debt ?]

A claim to recover unliquidated damages may not be a claim to enforce a debt, but when the damages are ascertained and a decree is passed, it becomes a judgement-debt. After a decree is passed, any sum of money recoverable under it, is a debt and it is not necessary to enquire into the character of the claim which resulted in the decree

Munshi *Jang Bahadur Lal*, for the respondent

The case in I. L. R., 35 All., relied upon was wrongly decided and it was not followed in the later case of I. L. R., 36 All.

Amar Chand could transfer the decree and even if Hari Das be considered as the transferee from the decree-holder, he could apply for execution of the whole decree.

The grant of letters of administration to Amar Chand conclusively established his title and any payment to his transferee would be a good payment and would completely protect the debtor.

Babu *Piari Lal Banerji*, was heard in reply

WALSH, J.—In this case the facts appear in the judgement of my brother Mr. Justice Sundar Lal. There is only one point of law involved in the appeal. But it is an important question of principle, the determination of which must necessarily involve the rights and interests of a considerable number of persons I am deciding this case upon the hypothesis, which I adopt as correct, that this is a case of debt, and that if the authority of *Allah Dad Khan* v. *Sant Ram* (1), relied upon by Mr. Peary Lal Banerji was rightly decided, Mr. Banerji is entitled to succeed. On the other hand if it was not rightly decided this appeal must fail. On a consideration of that case, a subsequent authority to which I will refer in one moment, and the language of the section itself, I entertain no doubt whatever that the decision relied upon by Mr. Banerji cannot be regarded as sound law. The contention

(1) (1912) I. L. R., 35 All., 79.

is that an assignee of a debt due to the estate of a deceased person cannot recover the debt without producing a succession certificate. That argument is based upon the language of section 4, sub-section 1, of the Succession Certificate Act (VII of 1889), which begins with these words, "no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or to any part thereof except on production of amongst other things, (1) probate, (2) a certificate." Now, to my mind a person claiming as an assignee of a debt which was due to the estate of a deceased person is not claiming "the effects of the deceased." From the date of assignment, the debt due to the deceased ceases to be part of the deceased's effects. The consideration for the assignment is substituted for the debt due to the estate and it is the consideration for the assignment, which from the date of the assignment, takes the place of the debt as part of the effects of the deceased person. Further it is important to bear in mind the scope and ambit of the Succession Certificate Act itself. All that it purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of deceased persons against the difficulty which may occur when disputes arise as to whether a claimant is or is not entitled as such personal representative, and the language used in sub-section 1 of section 4, is the language which is not merely appropriate, but is the language which is invariably adopted, to describe in legal terminology the position and claim of a person claiming as a personal representative of a deceased person. My view of the language used in that sub-section is that it was specially adopted in order to keep clear those narrow limits and this is borne out, by the words which follow on the word "production" *viz.*, "by the person so claiming." I think that clearly indicates that the claim contemplated by this section is a claim made by a person in the capacity of a personal representative of a deceased person. It is quite clear that in *Rang Lal* v. *Annu Lal* (1), two learned Judges of this Court were confronted with a concrete example involving consequences, possibly unforeseen, of the decision in

(1) (1913) I. L. R., 36 All., 31.

1916

GOSWAMI SRI RAMAN LALJI v. HARI DAS.

I. L. R., 35 All., 74(1), to which I have referred and which they felt a difficulty about following. It is clear that they did not adopt the reasoning upon which the earlier case had proceeded. It is equally clear that, as they point out in their judgement, the *ratio decidendi* of the earlier case turned upon the construction of section 16 of the same Act. Looking at the report it would appear that the mind of the Court which decided the case in 35 All (1) was really diverted from the real point by the argument which was addressed to them based upon the difference in the language employed with reference to the production of probate and that employed with reference to the production of the certificate. The result was that the difficulty, which I feel is the real difficulty, in the way of adopting the view which they took, *viz.*, the words "effects of the deceased," was not brought clearly to the notice of the court. If it had been, I cannot but think that they would have taken a different view. I have no hesitation in holding that the decision in *Allah Dad Khan* v. *Sant Ram* (1) is no longer law.

SUNDAR LAL, J.—I have arrived at the same conclusion. I may shortly state the circumstances of the case in dealing with the two contentions which have been urged by Mr. Peary Lal Banerji in support of the appeal. The facts broadly appear to be this. On the 31st of March, 1907, Goswami Sri Raman Lalji Maharaj and Brijpal Lalji sold certain property to one Seth Kishan Das by a deed of sale. They undertook to give possession to the purchaser of certain items of the property which were in the hands of a prior mortgagee. On the death of Seth Kishan Das, the property passed on by the law of survivorship to his son Seth Amar Chand. Seth Amar Chand and his wife Musammat Gulab Bai brought a suit in the court of the Subordinate Judge for possession of certain items of property which had been sold to them and in the alternative for damages to the extent of Rs. 8,000. On the 24th of November, 1909, the Subordinate Judge of Agra made a decree directing the defendants to deliver possession over the property in dispute and pay future mesne profits up to the date of possession with costs. From the original decree itself it is not very clear whether the learned Subordinate Judge

intended to give a decree for Rs 2,625 in the event of possession not being delivered though the judgement of the court might possibly give them that relief as well. We are not however construing the decree in this particular case at this stage of the case. This decree was appealed against to this Court and affirmed on the 9th of May, 1911. In the meantime Musammat Gulab Bai had died on the 28th of November, 1910. Under the Hindu law, Seth Amar Chand, the husband of Gulab Bai, was her sole heir, and he succeeded to her estate On February 1st, 1914, Amar Chand sold his interest in the decree, namely, that which he had as one of the original decree-holders as also as the heir to his wife, to Hari Das, the respondent in this appeal. It also appears that on February 25th, 1915, Amar Chand obtained letters of administration to the estate of his wife Musammat Gulab Bai from the Bombay High Court, under Act V of 1881. Hari Das as such purchaser has applied for the execution of the decree and the question before the court is, is he competent to do so? The first point urged by Mr Peary Lal Banerji is that the grant of letters of administration on the 25th of February, 1915, did not operate to validate the sale of February, 1914, and Hari Das must obtain a further sale deed from Amar Chand to entitle him to execute the decree. The grant of letters of administration to the estate of the deceased person takes effect and operates from the date on which the deceased died, and under section 14 of the Probate and Letters of Administration Act, Amar Chand's sale deed would be an operative sale deed in the same way as if he had obtained letters of administration prior to February 1st, 1914. Apart from this fact, under the Hindu law the property of Musammat Gulab Bai vested in Amar Chand and it is not disputed that under the Hindu law he was entitled to sell the property so inherited by him. The provisions of section 191 of the Indian Succession Act do not apply to Hindus and Muhammadans in these provinces. The estate of the deceased persons in such cases vests at once in the heir who is competent to dispose of the same. The first point therefore taken by him fails. The second point raised in the appeal is that under section 4 of the Succession Certificate Act, although letters of administration had been granted to Seth Amar Chand, it was necessary in law for Hari

1916

GOSWAMI SRI RAMAN LALJI v. HARI DAS.

Das to obtain fresh letters of administration to entitle him to apply for the execution of the decree. It may be noted that the decree was in favour of both Amar Chand and Gulab Bai. Amar Chand alone as a decree-holder was entitled to execute the decree. All that the court has to do in such a case is to safe-guard the rights of the other decree-holder, under rule 15 of Order XXI of the Code. As a vendee from him he was also entitled to execute the decree in the same way as his vendor Amar Chand. Hari Das therefore as transferee of Seth Amar Chand and in his capacity as such is entitled to execute the decree and the application for execution cannot therefore be defeated on that ground. He is entitled to proceed with the execution of such a decree under the rule already quoted. It is however urged that he has also purchased the rights of Musammat Gulab Bai which by inheritance had vested in Seth Amar Chand, so much of the decree as was in favour of Gulab Bai could not be executed in this instance unless he obtained letters of administration or a certificate to collect the debts of Gulab Bai. In the first place the decree was a joint and several decree and as purchaser of Amar Chand's rights he was entitled to execute the whole decree, and as Amar Chand himself was the heir of the other decree-holder the court could have easily safe-guarded his rights as such by a suitable order. But the execution of the decree could not be defeated. Again Mr. Peary Lal Banerji has relied upon a ruling of this Court in *Allah Dad Khan* v. *Sant Ram*, (1) and urged that the purchaser could not execute the decree without obtaining a certificate or a fresh letters of administration in respect of so much of the decree as represents her interest therein. In my opinion Act VII of 1889 was, as the preamble itself states, intended to facilitate the collection of debts on succession, and offers protection to parties paying debts to the representatives of deceased persons. The Act was intended to offer protection to debtors and to assure them that the certificate-holder was the person entitled as successor to the effects of the deceased person to receive payment of the debt. It was not intended to guarantee that the successor who had so obtained a certificate had also validly transferred his rights to a third party. An inquiry as to the validity of transfers made by a

(1) (1912) I. L. R., 35 All., 74.

1916

GOSWAMI SRI RAMEN LALJI v. HARI DAS.

certificate-holder is, I think, foreign to the scope and object of Act VII of 1889. If that were so, the result might be that where an heir obtained a certificate to collect ten items of debts and subsequently transferred each item of the debt to different transferees, the ten transferees would have each to obtain ten certificates to collect the debts transferred to them, and to apply for the revocation of the certificate granted to their vendor. I do not think that it was ever intended by the Legislature that this should be so. I entirely agree with the observation made by another Bench of this Court in *Rang Lal* v. *Annu Lal*,(1) on this point. If it were necessary to decide this point in this particular case I would have been inclined to come to the conclusion that the case in 35 All., 74, was not correctly decided, and that it has in fact been overruled by the later ruling in 36 All., 21. But for the reasons given by me it is not necessary to decide this point. I think as a representative of Amar Chand alone Hari Das was entitled to take out execution and this application could not be defeated. I would dismiss the appeal with costs, but in doing so I may observe that the other points of objection raised by the judgement-debtors have not been disposed of by the court below, and nothing that we say now would prevent the court below from disposing of the said points.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs

Appeal dismissed

Before Mr. Justice Walsh and Mr. Justice Sunda Lal

1916

May, 15.

FAZAL AHMAD (JUDGEMENT-DEBTOR) v. WESAL-UD-DIN AND ANOTHER (DECREE-HOLDERS)*

Civil Procedure Code (1908), *Order XXI, rule* 66—*Execution of decree—Ancestral property—General rules of practice for Civil Courts, chapter IV, rule* 5.

Property to which title is made out by gift is not property *inherited* within the meaning of rule 4, chapter IV, of the General Rules of Practice for the Civil Courts and such property is consequently not *ancestral*.

THE facts of this case briefly stated were as follows :—

The respondents decree-holders obtained a decree against the applicants judgement-debtors for a large amount on certain

* First Appeal No. 407 of 1915, from a decree of Rama Das, Subordinate Judge of Pilibhit, dated the 4th of October, 1915

(1) (1913) I L. R., 36 All., 21.

1916

FAZAL AHMAD v. WESAL-UD-DIN.

hypothecation bonds. In execution of the decree they applied for sale of the mortgaged property and the court fixed a date for the sale thereof. The judgement-debtors objected on the ground that the property was ancestral and could not be sold except by the Collector as ancestral property. The court below over-ruled the objection and directed that the property was to be sold.

The judgement-debtor appealed to the High Court.

Mr. *J. M. Banerji* (Babu *Preonath Banerji* with him), for the respondents, took a preliminary objection that the order of the court below was under Order XXI, rule 66, of the Code of Civil Procedure and as such it was merely an interlocutory order and consequently not appealable.

Deoki Nandan Singh v. *Bansi Singh* (1), *Sivagami* v. *Subrahmania Ayyar*, (2).

The objection was over-ruled.

Dr. *S. M Sulaiman*, for the appellants.

The property sought to be sold by auction was purchased by the grandfather of the appellants over 70 years ago, *i.e.* before 1846. It was inherited by their father who ultimately made a gift of the property to his sons, *i.e.* the present appellants. So far as the present appellants are concerned the property sought to be sold is certainly ancestral property.

The property sought to be sold comes within the words in the notification "All land being mahals or shares in or portions of mahals which have been owned by the proprietor or by persons from whom he has inherited such lands from the 1st of January, 1884."

[SUNDAR LAL, J.—Your clients did not inherit the property]. Though the appellants got it from their father as a gift. But in reality it was indirect inheritance.

The appellants were the only heirs of their father. If the father accelerated the succession by means of a deed of gift it makes no difference in the nature of the property. It remains ancestral all the same.

Mr. *J. M. Banerji*, for the respondents, was not called upon.

(1) (1911) 14 C. L. J., 35, S.C. 10 I C., 871. (2) (1904) I. L. R., 27 Mad., 259.

1916

FAZAL AHMAD v. WEHAL-UD-DIN

WALSH and SUNDAR LAL, JJ. :—This is an appeal arising out of the execution of a decree for sale of property. The decree-holder has applied for sale of a certain village. The question before the Court is whether the proceedings in execution should be in accordance with the rules relating to sale of ancestral property as defined in chapter IV, rule 5, of the General Rules of Practice for Civil Courts, or that proceedings should continue as for sale of non-ancestral property. The court below issued to the judgement-debtor a notice under rule 66 of Order XXI. According to the decree-holder the property was non-ancestral. The judgement-debtor appeared to show cause and has urged that in this particular case the property should have been held to have been ancestral land within the meaning of that term as used in rule 5 of that chapter. Under clause *(a)* of that rule all lands being mahals or shares in or portions of mahals which have been owned continuously, in the province of Agra by the proprietor from the 1st January, 1860 . . . or by the person or persons from whom such proprietor has directly or indirectly inherited such lands, are to be deemed ancestral land within the meaning of that rule. In this case the property was acquired by Ilahi Bakhsh, grandfather of the objector, in the year 1847. He gifted the property to Niaz Ahmad, who made a gift of the same to Fazal Ahmad in 1872. The rule in question applies to case where the property has been directly or indirectly *inherited* by the proprietor The question is whether property acquired by gift can be said to be inherited. Under the ordinary law of inheritance if Ilahi Bux and Niaz Ahmad had several heirs the property would have been divided and would have come in a fractional share only to Fazal Ahmad. But it is under a gift that Fazal Ahmad has acquired the whole property and we are unable to say that property to which title is made out by gift is property *inherited* within the meaning of the rule. We think the decision of the court below is correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

1916
May, 15.

Before Mr. Justice Piggott and Mr Justice Lindsay.

MUHAMMAD ABDUL JALIL (PLAINTIFF) *v* RAM DAYAL AND OTHERS (DEFENDANTS) *

Copyright—Preparation by a member of the Board of the Studies, Allahabad University, a list of graduated selection from different authors for certain examinations—Publication by the Syndicate of a syllabus containing amongst other items the selection already referred—Publication of same in book form by a book-seller—Infringement of copyright

A, a member of the Board of Studies of the Allahabad University, prepared at the request of the convener a list of graduated selections from standard Persian authors for the use of candidates for certain examinations of the University. In preparing these lists he spent considerable labour, learning and skill. The Board of Studies after due consideration adopted with slight modifications the selections shown in the list as the subject for those examinations in Persian and published the lists for the information of the public generally and of the candidates concerned specially. Subsequently to this *B*, a firm of publishers compiled books from the original authors according to those lists:—*Held* that *A* had no copyright in the lists as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities.

THE facts of this case are fully set forth in the judgement of the Court.

Mr. *Abdul Raoof*, Dr. *S M. Sulaiman* and *Munshi Jang Bahadur Lal*, for the appellant.

Mr. *M. L. Agarwala* and The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

PIGGOTT and LINDSAY, JJ.:—This is an appeal by the plaintiff in a suit claiming a perpetual injunction in respect of an alleged breach of copyright with substantial damages, from the defendant who are a firm of publishers in Allahabad. The books which are alleged to have infringed the plaintiff's copyright are three volumes of graduated selections from standard Persian authors, the said selections having been prescribed at the end of the year 1911, by the Allahabad University for the subject matter of its examinations, in the Matriculation, Intermediate and B A courses respectively, to be held in the year 1914. The plaintiff Maulvi Muhammad Abdul Jalil Shams-ulma is a professor of the Queen's College, Benares, and a member of the Board of Studies of the Allahabad University. In the early part of the year 1911, the question of the courses to be prescribed

* First Appeal No. 23 of 1913, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 21st of May, 1914.

1916

MUHAMMAD ABDUL JALIL v. RAM DAYAL

for the examinations in the Persian language in the year 1914, began to be discussed by the Board of Studies. A project for a book of selections suitable to the B. A course had been prepared by Mr. Amjad Ali, this was submitted to the convener of the Board of Studies and by him referred to the plaintiff for opinion. The plaintiff criticised this book adversely and it was suggested to him by the convener of the Board that he might himself propose suitable courses of study for each of the three examinations. The correspondence which followed is on the record of the case and has been laid before us in detail. It would seem from the plaintiff's own evidence that the idea of preparing graduated extracts from standard Persian authors, suitable for students preparing for each of the three examinations, had been previously present to the plaintiff's mind. At any rate he now offered not merely to prepare lists of selections for the approval of the Board of Studies, but to prepare books or readers embodying the result of his selections. He was warned by the convener that what was immediately required by the Board of Studies was merely lists of selections suggested as suitable, and eventually the plaintiff laid such lists before the Board of Studies of which, as already remarked, he was himself a member. The lists prepared by him for the Matriculation and Intermediate examinations were approved as they stood and the list prepared for the B. A examinations was passed with slight alterations. Towards the end of December, 1911, the Syndicate of the Allahabad University published a syllabus including, amongst other items, the selections already referred to, prescribed for students presenting themselves for the three examinations in question in the year 1914. In the meantime, and thereafter correspondence continued between the plaintiff, the Dean of the Faculty of Arts, and the Registrar of the University, on the subject of remuneration claimed by the plaintiff on account of the labour undertaken by him. The plaintiff in fact desired that the books which he was preparing on the basis of the lists approved by the Board of Studies should be prescribed by the University as the Persian readers recommended for the use of students preparing for the 1914 examinations and that his right as the compiler of these three books should be protected by

1916

MUHAMMAD ABDUL JALIL v. RAM DAYAL.

copyright. He made an alternative suggestion that the University should remunerate him for the labour which he had expended, and he named a sum of Rs. 4,029, as the remuneration to which he considered himself entitled.

This is not a suit for damages against the authorities of the Allahabad University and it is not necessary for us to enter into a discussion of the position as between the plaintiff and the University authorities, except in so far as we find it necessary to do so in order to throw light on the present litigation. The University of Allahabad was quite aware that, by prescribing any particular edition of selections from standard Persian authors for the use of students preparing for its examination it would add considerably to the market value of any edition so prescribed. It is clear also that the Allahabad University had no intention of thus enhancing the market value of any edition prepared under the supervision of its own Board of Studies, or by a member of the said Board. The defendants obtained access, as any member of the public was entitled to do, and as an enterprising firm of publishers was practically certain to do, to the syllabus printed under the authority of the University at the end of the year 1914. Their case is that the three books which form the subject matter of the present litigation owe nothing to the plaintiff personally. The defendants obtained the information they wanted from the syllabus of studies published by the University authorities. On the basis of the information so obtained they sought out the original texts and so prepared their edition of extracts in book form for each of the three examinations. The plaintiff contends that he has copyright in the results of his own labours as embodied in the lists published in the syllabus of the University. It may be conceded that a considerable amount of learning, experience and labour was applied by the plaintiff to the preparation of the lists which he submitted to the Board of Studies. It may also be that it was never the plaintiff's personal intention that this service on his part should be rendered gratuitously. He undoubtedly desired to prepare readers on the basis of the suggestions laid by him before the Board of Studies, and to obtain remuneration for himself by the sale of the readers so prepared. As a matter of fact the plaintiff

has himself prepared readers for each of the three standards on the basis of his own selections, and has published the same; but in each case the publication by the plaintiff took place subsequently to the publication by the defendants. We think that when the plaintiff as a member of the Board of Studies laid the results of his skill and experience before the Board, and then joined with the other members of the Board in preparing the syllabus for the examinations to be conducted in the Persian language in the year 1914, he placed the results of his labours unreservedly at the disposal of the University authorities. He may have desired that those authorities should either remunerate him for his labours, or take suitable measures to protect the copyright in the selections themselves. But when the University authorities published their syllabus they surrendered any copyright which may or may not have existed owing to the skill, learning, experience and labour expended on the preparation of these lists of passages from standard authors, unreservedly into the hands of the general public. The avowed intention of the University authorities was that any enterprising firm of publishers which considered it a remunerative speculation should bring out the passages in question in book form. They were of opinion that the interests of the public, and of the general body of students, would best be served by allowing free competition in this matter. We think these facts need only be set forth in order to make it clear that the plaintiff retains no copyright in the selections as such.

In the court below a strenuous effort was made on the part of the plaintiff to put his case upon another, or an alternative basis. It was suggested on his behalf that the defendants had saved themselves the labour of referring to the original Persian authors by getting hold, in some way or other, of the plaintiff's own manuscripts as they were passing through the press. This question has been very fully dealt with by the learned District Judge. The suggestion put forward on the part of the plaintiff admittedly rested upon no direct evidence. It was sought to base it merely on a comparison of the two editions, that is to say, of the edition first published by the defendants and the edition subsequently published by the plaintiff. The learned District Judge has,

1916

MUHAMMAD ABDUL JALIL v. RAM DAYAL.

sufficiently shown that there is no basis in fact for the plaintiff's plea on this point, and that such coincidences as were relied upon by him have been sufficiently explained in the evidence given by the defendants.

For the reasons stated we find no force whatsoever in this appeal. We dismiss it accordingly with costs.

Appeal dismissed.

PRIVY COUNCIL.

1916
June, 26.

RADHA KUNWAR (DEFENDANT) v. REOTI SINGH (PLAINTIFF.)

[On appeal from the High Court of Judicature at Allahabad.*]

Appeal to Privy Council—Valuation of appeal—Civil Procedure Code (1908), *section* 110—*Appealable amount subject-matter of appeal—Suit to enforce mortgage—Person made defendant as having adverse claim on the mortgaged property—Appeal on rejection of her claim by High Court.*

In a suit to enforce a mortgage for Rs. 2,000, the amount due upon which was Rs. 38,000 the mortgagee (respondent) asked for payment or for a sale of the mortgaged property. Besides the parties who claimed under the mortgagor the appellant who set up an adverse claim to a portion of the mortgaged property and the person through whom she claimed were made defendants and they alone defended the suit. The Subordinate Judge allowed a moiety of her claim, but on appeal the High Court held that she had no title to any of the property. The High Court granted her leave to appeal to His Majesty in Council under section 110 of the Civil Procedure Code, 1908, on the ground that as the mortgage decree imposed on the property a liability for Rs. 38,000 the subject-matter of the appeal was a sum exceeding Rs. 10,000.

Held by the Judicial Committee (on a preliminary objection that the appeal was not maintainable as the subject-matter of it was below the appealable value), that as between the respondent seeking to enforce his mortgage and the appellant it was quite immaterial what the amount of the mortgage was, and that the subject-matter in dispute was not the Rs. 38,000 but simply the value of the property the appellant claimed, which was not shown to be of the amount prescribed by section 110 of the Civil Procedure Code, 1908.

APPEAL No. 46 of 1915 from judgement and decree (12th March, 1912) of the High Court at Allahabad, which varied a judgement and decree (8th June, 1910) of the Subordinate Judge of Aligarh.

* *Present.*—The LORD CHANCELLOR (Lord BUCKMASTER) Lord ATKINSON and Sir JOHN EDGE.

1916

RADHA KUNWAR v. REOTI SINGH.

The suit out of which this appeal arose was brought by the respondent on the 20th of November, 1909, to recover Rs. 38,495 due on a mortgage bond, dated the 7th of July, 1884, executed by one Mahtab Kunwar in favour of Sobha Kunwar (since deceased), the mother of the present respondent, whereby a 10-biswa share in mauza Mobrakpur was hypothecated for Rs. 2,000.

The appellant was made a party defendant to the suit as claiming to be owner of a 4 odd biswa share through one Hukum Singh, who, she alleged, had executed a mortgage bond for that portion of the property in suit in her favour. That bond the plaintiff alleged to be fictitious and made without consideration. Hukum Singh and Radha Kunwar alone defended the suit the other defendants, Mahtab Kunwar (the mortgagor), Bhup Kunwar (her transferee) and three grandsons of the original mortgagee (Sobha Kunwar) not appearing

The interest of the appellant in the suit depended therefore entirely on whether Hukum Singh, through whom she claimed, was the owner of any portion of the mortgaged property. On that question the Subordinate Judge held that a 2 odd biswa share belonged to Hukum Singh, and accordingly, in giving the respondent a mortgage decree, he excepted the 2 odd biswa share from sale under the mortgage as being the share to which the appellant was entitled under her claim.

From that decision both Radha Kunwar and Reoti Singh appealed to the High Court (Sir H. D. GRIFFIN and CHAMIER, JJ.) who held that none of the mortgaged property belonged to Hukum Singh and that the plaintiff was entitled to sell all of it under the mortgage decree. Consequently the appeal of Reoti Singh was allowed and that of Radha Kunwar dismissed.

On the application of Radha Kunwar for leave to appeal to His Majesty in Council Sir HENRY RICHARDS, C.J., and Sir P. C. BANERJI, J, in granting leave after hearing argument on either side said :—

"This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the court below exceeds Rs. 10,000. This Court reversed the decision of the lower court; and therefore if the value of the subject-matter of the proposed appeal exceeds Rs. 10,000, the

1916

RADHA KUNWAR v. RIOTI SINGH.

case is one which fulfils the requirements of section 110 of the Code of Civil Procedure. It is, however, urged that the value of the subject-matter of the proposed appeal to His Majesty does not exceed Rs. 10,000, and this contention is based on the following facts. The suit was one to recover Rs. 38,000 and odd by enforcement of a mortgage. A part of the property comprised in the mortgage was exempted from liability under the mortgage by the court below. An appeal was preferred to this Court, and it was held that the whole of the mortgaged property was liable to sale in enforcement of the mortgage. It is in respect of this part of the decree of this Court that the applicant seeks to appeal to His Majesty in Council. It is alleged that the value of property, which by the proposed appeal is sought to be exempted from liability under the mortgage and decree passed on it is Rs. 2,000 odd, and this amount must be regarded as the value of the subject-matter of the appeal to His Majesty. We do not agree with this contention. The decree imposes on the property a liability for Rs. 38,000 and odd. Therefore the value of the subject-matter of the appeal to His Majesty is a sum exceeding Rs. 10,000, and the case fulfils the requirements of section 110, and we so certify."

On this appeal—

Sir W. Garth for the appellant.

De Gruyther, K.C., and *B. Dube*, for the respondent.

A preliminary objection was taken that the appeal was not maintainable, inasmuch as the value of the subject-matter of the appeal was less than Rs. 10,000. For the respondent it was contended the appeal related only to the value of the 2 odd biswa claimed by the appellant: that was the only subject-matter in dispute in this appeal. There was no question of law, and therefore no reason for the exercise of the discretion of the High Court to certify the case as "otherwise" fit for appeal. Reference was made to section 100 of the Civil Procedure Code, 1908, and *Banarsi Prasad* v. *Kashi Krishna Narain* (1), which was a case decided under the Civil Procedure Code 1882, sections 596, 600.

For the appellant it was contended that the High Court had rightly granted the certificate of leave to appeal. The

(1) (1900) I. L. R., 23 All., 227.

appeal related to the whole subject-matter of the suit. It could not be said that the mortgage debt did not equally affect every portion of the property mortgaged. The 2 odd biswas might if the appeal failed be sold by the mortgagee for the whole of the mortgage debt. The value of the 2 odd biswas claimed by the appellant had not been certified, and the case should therefore be remanded for the determination of the value of the appellant's claim to make it certain whether its amount would maintain the appeal or not.

1916, June 26th:—The judgement of their Lordship was delivered by the LORD CHANCELLOR:—

It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these: In 1884 a mortgage was executed of certain property for a sum of Rs. 2,000, with interest at 12 per cent. On the 20th of November, 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was Rs. 38,494, and they asked for an order for payment of that sum against the defendant and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion

What followed was this: The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to 4 biswas of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good, the mortgagee would

1916

RADHA KUNWAR v. RECHI SINGH.

have completely failed, so far as her share of the estate was concerned: if it had been held that her claim was bad, she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th of June, 1910, a decree was made by the Subordinate Judge in which he declared that the appellant was entitled to one-half of the 4 biswas which had been set up as her original claim From that decree an appeal was taken to the High Court, and on the 14th of November, 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim and as to one-half there were differing judgements. The appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgement of the High Court, and for that purpose it was essential that she should satisfy the condition of section 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject matter of the suit in the Court of First Instance was Rs 10,000, or upwards "and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards"

Upon the appellant's application for a certificate that the value of the subject-matter exceeded the Rs. 10,000 there appears to have been argument before the High Court and a certificate has been given in her favour. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

Their Lordships think that the respondent's contention in this respect is correct The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the 2 biswas, while the appellant asserted that it related to the whole subject-

matter of the suit which was Rs 38,000 This latter argument was enforced by suggesting that if the appellant's case failed the mortgage would operate over the whole of the property and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage debt, that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those 2 biswas, and the subject-matter of the disputes therefore was Rs. 38,000. This contention prevailed before the High Court, and they state in terms that the decree which was the subject of appeal had imposed on the property a liability for Rs. 38,000 and that in consequence the value of the subject-matter of the appeal exceeded the necessary prescribed sum

Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject-matter of the suit was not Rs. 38,000. The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

Their Lordships think that the subject matter of this appeal is nothing but the 2 biswas to which the Subordinate Judge found that the appellant was entitled.

Then Sir *Walham Garth* urges that in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those 2 biswas would support the value of Rs. 10,000 and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships

1916

RADHA KUNWAR v. REOTI SINGH.

think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those 2 biswas exceeded the Rs 10,000—a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgement of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the 2 biswas, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage debts. It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *Barrow, Rogers and Nevill.*

J. V. W.

P. C.* 1916 *June*, 22. *July*, 21.

AHMAD RAZA AND OTHERS (DEFENDANTS) v. ABID HUSAIN AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Evidence—Secondary evidence—Certified copy of petition of compromise made in 1857—Record of proceedings destroyed in the Mutiny—Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Bengal Regulation, X of 1829—Objection that certified copy is insufficiently stamped—Petition treated as document creating mortgage.

In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857, the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on 1st of April, 1857. The record of the proceedings was admittedly destroyed in the mutiny of that year. The document, which was admitted in evidence by the Subordinate Judge, recited the terms on which the dispute was settled amongst them being the agreement relating to the mortgage, and an endorsement on it, after reciting that "the pleaders for the parties filed the compromise in the presence of their respective clients, and verified and admitted all the

* *Present.*—Lord SHAW, Lord PARMOOR and MR. AMEER ALI.

1916

AHMAD RAZA v. ABID HUSAIN

conditions laid down therein," ordered that "the compromise be placed on the record, and the case be put up to-morrow for final disposal." Then followed the date and the signature of the Zillah Judge in English. The certified copy was on the 28th of April, 1857, issued to the pleader acting for the predecessors of the plaintiffs. It bore a stamp of one rupee. The defence was that the contract was not enforceable as the document was not properly stamped. The Subordinate Judge overruled the objection and decreed the suit. The District Judge held that the copy was required by art. 20 of Regulation X of 1829, to bear a stamp of the same value as the original compromise; that the original bore a stamp of one rupee only, but required a stamp of ten rupees, and so it was insufficiently stamped its copy was not admissible in evidence. He reversed the decision of the first court and dismissed the suit. The High Court on appeal restored the decision of the Subordinate Judge.

Held by the Judicial Committee (affirming that decision) that the mortgage was made verbally and was valid according to the law then in force, and it was notified to the court as part of the settlement. The present suit was not based on any agreement contained in the petition, but on a contract made outside and recited in it to enable the court to make a decree in accordance with the settlement. If the Judge did so, the defendants' objection fell to the ground, and, whether he did or not, the suit based on the agreement made independently of and before the petition was filed in Court was clearly maintainable.

If, however, the petition was treated as the document creating the mortgage it might rightly be presumed that the officer before whom it was presented satisfied himself that it was properly stamped. No inference could be drawn from the fact that the copy bore a one rupee stamp, for that is the proper stamp for issuing a copy of the proceeding in the Zillah Court, and as a copy of the petition and the order thereon it bore the proper Court fee stamp of one rupee. The District Judge fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

APPEAL No 103 of 1915, from a judgement and decree (2nd April, 1913) of the High Court at Allahabad, which reversed a judgement and decree (28th May, 1912) of the District Judge of Azamgarh and restored a judgement and decree (29th March, 1912) of the Subordinate Judge of Azamgarh.

The only question for determination on this appeal was whether a document which had been admitted in evidence in the court of the Subordinate Judge was properly stamped.

The suit which gave rise to the appeal was instituted on the 7th of December, 1910, by the respondents against the appellants for the redemption of a usufructuary mortgage of a 12-anna share in a village called Malgaon.

1916

AHMAD RAZA v. ABID HUSAIN

The appellants denied the execution of the mortgage, and in the course of the hearing the respondents tendered as evidence of the mortgage a certified copy of a *sulehnama*, or petition of compromise, filed in a partition suit between the ancestors of the parties respectively, and dated the 1st of April, 1857. The petition recorded a compromise come to between the parties which contained the terms of the mortgage now sued upon, and was signed by the pleaders of both parties, and bore the following endorsement by the District Judge :—

"To-day the pleaders for the parties filed this compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein. It is, therefore, ordered that the compromise be placed on the record and the case be put up to-morrow in the foreenoon for final disposal."

(Signature of the District Judge in English.)

The copy was stamped with an engraved one rupee stamp.

The records of the suit were, with many others, destroyed in the mutiny, and the copy was therefore the only available evidence of the terms of the compromise.

The document was objected to on the ground that it was not properly stamped, but the Subordinate Judge held that the stamp was sufficient, and admitted it in evidence In giving his judgement he held as to the document that though it was only stamped as a petition, it was admissible in evidence as there was nothing to show that the agreement recited in it was ever reduced to writing, and he decreed the suit in favour of the respondents on the basis of the mortgage with costs.

The District Judge on appeal held that though an oral mortgage would have been valid according to the law then in force, yet, having regard to the way in which the case was presented in the present suit it must be taken that the document was not relied on as evidence of an oral agreement, but as being the mortgage itself; and that having regard to article 20 of Regulation X of 1829, it must be taken that the original petition was stamped in the same way as the copy, whereas according to the law then in force the original should have borne a stamp of Rs. 10. The District Judge accordingly held that the document was not admissible in evidence as being improperly stamped, and there being no other evidence of the mortgage in suit, he dismissed the suit with costs of both courts.

1916

AHMAD RAZA v. ABID HUSAIN.

The respondents appealed to the High Court (Sir H. D. GRIFFIN and A. E. REVES, JJ.), who held that under section 36 of the Stamp Act (II of 1899), the document, having been admitted as properly stamped by the court of first instance, could not be objected to on this ground in appeal; that even if article 20 of the Regulation relied upon was applicable to a certified copy given by the Court, it did not follow that the original must have been stamped in the same way as the copy: and that in the absence of any evidence to the contrary, it must be presumed that the court acted according to law, and was satisfied under section 3 of the Regulation that the document was duly stamped before it was placed on the record. The High Court accordingly allowed the appeal, and restored the judgement and decree of the court of first instance with costs throughout.

The material portion of the judgement was as follows:—

"Relying on this copy the first court decreed the suit. On appeal it was argued, *inter alia*, that even if the copy were genuine it is not admissible in evidence because the original was not properly stamped The learned Judge upheld this contention and came to the conclusion that 'the original compromise bore a stamp of one rupee only, that the document required a stamp of Rs 10, and that as the document was insufficiently stamped its copy was not admissible in evidence.' He goes on to say, 'When that document is removed there is no evidence to prove the mortgage alleged by the plaintiff.' In the result he allowed the appeal and dismissed the suit.

"Before us the only question is whether the learned Judge was right in discarding the copy. In my opinion he was not. The copy itself was admitted in evidence by the first court, and although there is no distinct finding by that court, in so many words, that the document was properly stamped, yet such a finding must be inferred from the fact that the court relied on the case of *Ramdyal* v *Dhoobey Jhaunnan Lal* (1) and another case as its authority for holding that the document was admissible in evidence The head-note in *Ramdyal* v., *Dhoobey Jhaunnan Lal* runs as follows:—'A document in the shape of a petition to a court setting forth an arrangement come to between the parties in a suit, may be received in evidence in support of a fresh suit founded upon the agreement recited in such petition, although only stamped as a petition, it not appearing that the agreement recited was made in writing.'

As the document was admitted in evidence no further question can arise under section 36 of the Stamp Act of 1899, as to its admissibility on the ground that it was not duly stamped. If, however, it could be shown that the original document of which it was a copy was not duly stamped, it would not be available as secondary evidence of the original. But there is no evidence whatsoever as to what stamp, if any, was affixed to the original. The learned Judge

(1) (1871) 3 N. W. P., H. C. Rep., 14.

1916

AHMAD RAZA v. ABID HUSAIN

holds that the copy required to be stamped in accordance with article 20 of Regulation X of 1829. The article runs as follows:—'Copy or counterpart of any deed or instrument attested to be a true copy and furnished to a party to the same, for the purpose of being given in evidence for the recovery of any sum of money, property, interest or rights secured thereby—the same duty as prescribed for the original deed by this Regulation.' He considers that the compromise should have been stamped as a mortgage with a ten rupee stamp. Inasmuch as the copy is on a paper with a one rupee engraved stamp he says, 'It is clear therefore that on the original deed of compromise the stamp affixed was of one rupee.' Even if article 20 was applicable to a copy like this given by a court, of a document filed in a judicial proceeding, I do not think it at all follows that because the copy bears a particular stamp that the original must have borne a stamp of the same value. The concluding words of the article are 'the same duty is prescribed for the original deed.' If they had been 'the same duty as paid for the original deed,' there might have been some force in the argument. In the absence of any evidence to the contrary, I think we must presume that the court acted according to law, and according to section 3 of the said Regulation was satisfied that the document was duly stamped before it was placed on the record.

"The various cases which have been cited by the learned Judge are all distinguishable from this case, inasmuch as in every one of them the original document was before the court and the stamp was patent on the face of it. Here, as I have said, the original records were destroyed in the mutiny and there is nothing to show how the document was stamped. In my opinion therefore there was no evidence on which the learned Judge could come to the conclusion that the original document was not duly stamped."

On this appeal—

E. B. Raikes for the appellants contended that the document was inadmissible in evidence as not being properly stamped, and was rightly rejected by the District Judge. Secondary evidence could not, it was submitted, be given without proof that the lost document was duly stamped. If the original document was not stamped a penalty could be paid and this document could be stamped, but if the original is lost the copy could not be stamped as the Stamp Act (II of 1899), did not provide for the payment of a penalty on the copy. Reference was made to section 36 of Act II of 1899, and to *Sri Venkata Sveta Chalapati Ranga Rao* (*Raja of Bobbili*) v. *Inuganti China Sitaramasami Garu* (1). The District Judge found that the compromise was only stamped with a one rupee stamp which he held was insufficient, as it should have borne a ten rupee stamp under section 20 of schedule A of Regulation X of 1829. Assuming

(1) (1893) I. L. R., 23 Mad. 49; L. R. 26 I. A., 262.

that the document admitted in evidence, which is a copy of a compromise said to create the relationship of mortgagor and mortgagee, was properly stamped the question arises whether that relationship was created. Did the compromise require to be stamped as a mortgage deed or not? The Subordinate Judge was of opinion that it was merely the recital of an oral agreement between the parties [Lord SHAW: The document was filed in Court in 1857, and afterwards destroyed in the mutiny. Do you ask us to assume it was not properly stamped at the time it was filed, and that when the Court ordered it "to be put up to-morrow for final disposal," nothing was done with it afterwards?] An application for a consent decree on a compromise was not a document which would ordinarily be stamped: and there was nothing to show that the Court made a decree on the compromise. [Mr. [AMEER ALI: At that time the parties might have made a verbal mortgage which was embodied in the petition] That was the view taken in the case of *Ramdyal* v. *Dhoobey Jhaunnan Lal* (1) referred to by the Subordinate Judge, but the facts of that case were different from those of the present case which made it distinguishable, and inapplicable. Reference was made to Regulation X of 1829, Schedule A, article 20; and schedule B, articles 3 and 17, and it was submitted that the decree of the District Judge should be restored

De Gruyther, K. C., and Sir *W. Garth* for the respondents were not called on.

1916, July 21st :—The judgement of their Lordships was delivered by Mr. AMEER ALI :—

This appeal from a judgement and decree of the High Court of Allahabad arises out of a suit brought by the plaintiffs in the court of the Subordinate Judge of Azamgarh, for the redemption of a usufructuary mortgage alleged to have been created in 1857, in respect of a 12 annas share in the village of Malgaon. The document on which they rely to establish the mortgage is a certified copy of a petition of compromise filed in court on the 1st of April, 1857. It is not disputed that the record of the proceedings in which this petition was filed was destroyed in the mutiny, which broke out shortly after. The certified copy is.

(1) (1871) 3 N. W. P., H. C. Rep., 14

1916

AHMAD RAZA v. ABID HUSAIN.

however, admissible in evidence relative to the facts recited therein, and was rightly admitted by the Subordinate Judge. The question for determination in this appeal is, however, whether if the petition is to be treated as creating the mortgage, it was properly stamped in accordance with the Indian Statute then in force to entitle the plaintiffs to sue upon it.

The facts which led to its being filed in court are simple. A suit had been brought by the plaintiffs' ancestors against the predecessors of the defendants for a decree for possession "by partition" of the 12-anna share in mauza Malgaon to which they claimed to be entitled. Their claim appears to have been dismissed by the first court. The appeal from this dismissal of their suit, preferred by the plaintiffs, was pending before the Zillah Judge. The parties, however, came to a compromise, and, as stated already, on the 1st of April, 1857, filed before that officer the petition in question, signed by the pleaders of the parties. In this petition they notified to the court the terms of the settlement, and prayed that the case might be decided according to the conditions set forth above. These "conditions" are stated in the body of the petition in the following terms :—

"Now the parties have come to a settlement in this way, that we, the respondents, admit the ownership of the appellants, and that the claim has been brought within time; that the respondents shall remain in possession of the aforesaid property for a period of twelve years in lieu of the mortgage money; that the appellants shall redeem the aforesaid property after twelve years, on payment of the mortgage money out of their own pocket."

The order endorsed on the document is as follows :—

"To-day the pleaders for the parties filed this compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein. It is, therefore, ordered that the compromise be placed on the record, and the case be put up to-morrow in the forenoon for final disposal."

And then follows the date (1st April, 1857) and the Judge's signature in English.

On the 28th of April, 1857, the certified copy now filed was issued to the pleader acting for the predecessors of the plaintiffs.

The present suit is based on the recital in the petition relating to the mortgage. The defendants, among other pleas, raised the objection that the contract was not enforceable, inasmuch as the document was not properly stamped. The Subordinate Judge overruled this objection, and holding in favour of the plaintiffs on

the other points, decreed their claim. The District Judge on the appeal of the defendants came to a different conclusion. He was of opinion that "the original deed of compromise" bore only a stamp of one rupee, and he went on to say :—

> "If the original had borne a stamp of ten rupees, the stamp on the copy would also have been one of ten rupees, as required by article 20 of Schedule (A) of the Regulation. I hold that the original compromise bore a stamp of one rupee only ; that the document required a stamp of ten rupees, and that as the document was insufficiently stamped its copy is not admissible in evidence"

He accordingly reversed the decision of the Subordinate Judge and dismissed the suit. The plaintiffs thereupon appealed to the High Court of Allahabad, which set aside the decree of the District Judge and restored that of the first court.

The defendants have appealed to His Majesty in Council, and their main contentions against the judgement and decree of the High Court are the same that found acceptance before the District Judge.

In their Lordships' opinion there are two short answers to the defendants' objections. It is not disputed that before the Indian Transfer of Property Act (IV of 1882) came into force, such mortgages could be created without any writing, outside the Presidency towns, by simple delivery of possession. The petition by which the compromise was notified to the court recites the terms on which the dispute was settled, among them being the agreement relating to the usufructuary mortgage. The mortgage was made verbally, and was valid according to the law then in force ; it was notified to the court as a part of the settlement. The present suit is not based on any agreement contained in the petition ; it is based on a contract made outside and recited in it to enable the court to make a decree in accordance with the settlement. If the Zillah Judge passed a formal order, as he proposed to do, embodying in his decree the terms of the settlement, and there is no reason to suppose that he did not, the present objection must necessarily fall to the ground. But whether he did or did not, the present suit, based on the agreement made independently of and before the petition was filed in court, would be clearly maintainable.

Again, if the petition is to be treated as the document creating the mortgage, it may be rightly presumed that the officer

1916

AHMAD RAZA v. ABID HUSAIN.

before whom it was presented satisfied himself that it was properly stamped No inference can be derived from the fact that the copy bears a one rupee stamp. Under the Court Fees Act (VII of 1870), it is the proper stamp for issuing a copy of the proceeding in the Zillah Court, and as a copy of the petition and the order thereon, it bears the right court fee stamp of one rupee. The District Judge clearly fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

Their Lordships concur generally with the reasons given by the learned Judges of the High Court for overruling the decision of the District Judge, and they are of opinion that this appeal should be dismissed with costs.

And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson & Co*

Solicitors for the respondents :—*Watkins & Hunter.*

J. V. W.

APPELLATE CIVIL.

1916

May, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

UDIT NARAIN MISIR AND OTHERS (DEFENDANTS) v. ASHARFI LAL (PLAINTIFF) AND AKHRAJ LAL AND OTHERS (DEFENDANTS) *

Mortgage—Subrogation—Partial discharge of prior incumbrance—Purchaser of equity of redemption entitled to stand in the shoes of prior incumbrancer to the extent that incumbrance has been discharged.

A purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer where the purchaser has, with the consent of that incumbrancer, partially discharged the liability

Gurdeo Singh v. *Chandrikah Singh* (1) dissented from. *Chetwynd* v. *Allen* (2) followed. *Baroness Wenlock* v. *The River Dee Company* (3) referred to.

THE facts of the case are as follows :—

The plaintiff Asharfi Lal instituted the present suit to enforce a mortgage, dated the 29th of June, 1904, executed

* Second Appeal No. 140 of 1915, from a decree of Lal Gopal Mukerji, Subordinate Judge of Gorakhpur, dated the 22nd of September, 1914, modifying a decree of Charu Deb Banerji, Munsif of Pansi, dated the 10th of December, 1912.

(1) (1907) I. L. R., 36 Calc., 193. (2) [1892] 1 Ch. D., 858.

(3) (1887) L. R. 19Q. B. D., 155.

1916

UDIT NARAIN MISIR v. ASHARFI LAL

by Hanuman Prasad and another. One of the mortgaged properties was a 10-pie share of mauza Bakhera Khas. This 10-pie share was subsequent to the plaintiff's mortgage, purchased by Udit Narain and Mahabir, appellants, from the mortgagor. They pleaded that they had paid off certain prior incumbrances and were to that extent entitled to priority as against the plaintiff. The lower appellate court found that they had paid Rs. 309, to a prior mortgagee, but this payment was insufficient to discharge that mortgage in full as a much larger sum was due to the prior mortgagee on the date of payment. The court held that "it is only when a transferee completely satisfies a prior charge, that he can use it as a shield against an attack. A mere part payment does not confer any right on the transferee to hold the mortgage as a shield. Udit Narain and Mahabir cannot therefore call upon the plaintiff or any one who may purchase the property in execution of the mortgage decree to pay them the sum of Rs. 309."

Udit Narain and Mahabir appealed to the High Court.

Pandit *Braj Nath Vyas*, for the appellants: —

The appellants are entitled to priority to the extent of the amount paid by them and accepted by the mortgagee. The opposite view would lead to the conclusion that the security of the plaintiff would be enhanced in value for no reason whatever.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the plaintiffs respondents: —

The view taken by the court below was right. A subsequent purchaser could claim subrogation only when he discharged in full a prior charge. A mortgage security was single and indivisible and could not be broken up at the mere will of the mortgagee or the mortgagor. A claim for enforcement of a part of the mortgage would not ordinarily lie. If a mere part payment was held to validate a claim for subrogation, it would result in great confusion and multiplication of suits. He relied on *Gurdeo Singh* v *Chandrikah Singh* (1); Ghose on Mortgages, p. 332; Jones on Mortgages, 6th ed., Vol. 1, sec. 874, p. 918; *Chetwynd* v. *Allen* (2).

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.: —This appeal arises out of a suit to realize the amount of a mortgage, dated the

(1) (1907) I. L. R., 36 Calc., 1003. (2) [1899] 1 Ch. D., 853.

1916

UDIT NARAIN MISIR v. SAHARFI LAL.

29th of June, 1904. The point for decision in the present appeal arises under the following stated facts. In the year 1907 the appellants (who are defendants to the suit) purchased a 10-pie share of mauza Bakhera. It has been found by the court below that Rs. 309 went to discharge a prior mortgage of 1899. The defendants had contended that all that was due upon this previous mortgage was Rs. 309, which they paid. The court below has found that the appellants did in fact pay Rs 309, but that they did not discharge the entire amount due on foot of the mortgage of 1899. No claim, however, seems ever to have been made on foot of this mortgage of 1899, and it seems long to have been barred by limitation. We must, however, for the purpose of the present appeal assume that the court below rightly decided that the appellant had only discharged the prior mortgage in part. The question is whether, having not entirely discharged the mortgage, they are entitled to be substituted for the prior incumbrancer even to the extent of Rs. 309, which they admittedly paid. The court below has held that the appellants were not entitled to claim priority in respect of this sum against plaintiff. It seems to us that this decision was wrong. If a purchaser of the equity of redemption discharges a prior incumbrance he is under ordinary circumstances admittedly entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer By payment of the prior incumbrance the purchaser of the equity of redemption enhances the security of the puisne incumbrancer and he has relieved him of obligation to discharge the prior incumbrance or to be obliged to sell the property subject thereto. The contention is that this right of the purchaser is limited to cases in which he has discharged the prior incumbrance in its entirety. It is difficult to see upon what principle this distinction proceeds. No doubt the prior incumbrancer is entitled to refuse a part payment of his mortgage debt. If, however, he accepts the part payment and allows the liability upon the property to be discharged in part, the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged, though not the same extent. His security is enhanced to the extent that the debt has been discharged. There seems to be no reason why the purchaser of the equity of

redemption should not be entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer partially discharged the liability. In support, however, of the contention (which found favour in the court below) the learned advocate for the respondents has relied on the case of *Gurdeo Singh* v. *Chandrikah Singh* (1). With great respect to the learned Judges who decided that case we are unable to agree with them. They quote a passage from Jones on Mortgages, which, with every possible respect, we think has been misunderstood. In the case of *Chetwynd* v. *Allen* (2) a prior mortgage had been partially paid off and the party so paying was held entitled to stand in the shoes of the prior incumbrancer to the extent of the money advanced. It is true that the particular question which arises in the present case was not discussed, but it would appear that no one ever thought of raising the point. In *The Baroness Wenlock* v. *The River Dee Company* (3) the doctrine of subrogation was discussed In that case a Company had borrowed money beyond its powers. Part of that money was paid away by the Company in discharge of certain liabilities of the Company existing at the time the money was lent. A further portion of the money went to discharge liabilities incurred by the Company subsequent to the advance of the money All sides admitted that the lender was entitled to stand in the shoes of the creditors whose debts existed at the time of the advance The question was whether the lender was also entitled to stand in the shoes of the creditors whose debts were incurred and discharged subsequent to the loan. The Court of Appeal consisting of Lord ESHER, M. R, FRY and LOPES, L. J., held that the lender was entitled to recover his money by being subrogated for the creditors of the Company. By reason of the fact that the appellants in the present case paid off the mortgage in part no further liability was thrown on the puisne incumbrancer or the property. In our opinion the appellants were entitled to stand in the shoes of the prior incumbrancer to the extent of the further sum of Rs. 309. We accordingly allow the appeal and modify the decree of the court below by directing that the plaintiff must pay to the appellants a further sum of

(1) (1903) I. L. R., 26 Calc., 193 (193, 220) (2) [1899] 1 Ch D, 853.

(3) (1887) L. R, 19 Q. B, D., 155.

1916

UDIT NARAIN MISIR v. ASHARFI LAL.

Rs. 309, that is to say in all Rs. 434, as a condition precedent to bringing the 10-pie share of mauza Bakhera to sale. The money must be paid within six months from this date. If the money is not paid within that time the suit will stand dismissed as against the appellants in respect of 10-pie of the Bakhera. If the money is paid within the time aforesaid the plaintiff will be at liberty to add this amount to his own claim against the share and sell the said 10-pie share. The appellant will have his costs of this appeal (to be paid by the plaintiff respondent).

Appeal decreed.

REVISIONAL CRIMINAL.

1916
May, 25

Before Mr. Justice Sundar Lal.

EMPEROR *v.* AIJAZ HUSAIN.*

Act No. XLV of 1860 *(Indian Penal Code), section* 225*B—Warrant of arrest—Actual resistance necessary.*

In order to constitute an offence under section 225B of the Indian Penal Code something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest.

THE facts this case were as follows :—

One Barkat Hasan was the lambardar of a village. He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accused Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue, but he objected. Thereupon the matter was reported to the Collector. The Collector passed an order directing realization of the revenue by the arrest of the accused. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February, 1916, returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of the other co-sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain for whose arrest the warrant was issued. This co-sharer took the

* Criminal Reference No. 336 of 1916.

1916

EMPEROR v. AIJAZ HUSAIN.

chaprasis to the place where the accused was. According to the report of the chaprasi endorsed on the warrant the accused declined to be arrested, was ready to quarrel and said :—"take me, if you can, to the tahsil, I won't go."

Upon those facts the accused was convicted of an offence under section 225B of the Indian Penal Code The case was tried summarily. No evidence was recorded. The learned Magistrate setting out in detail the case for the prosecution concludes by saying :—"I find the charge against him proved."

The Sessions Judge of Moradabad referred the case to the High Court in order that the conviction may be set aside.

The Crown was not represented.

Dr. *S. M. Sulaiman*, for the opposite party.

SUNDAR LAL, J :—This is a reference made by the Sessions Judge of Moradabad. The facts of the case are as follows :—One Barkat Hasan was the lambardar of a village He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accused Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue, but he objected. Thereupon the matter was reported to the Collector. The Collector passed an order directing realization of the revenue by the arrest of the applicant. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February, 1916, returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of other co sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain for whose arrest the warrant was issued. This co-sharer took the chaprasis to the place where the accused was. According to the report of the chaprasi endorsed on the warrant the accused declined to be arrested, was ready to quarrel and said :—"Take me, if you can, to the tahsil, I won't go."

The chaprasi's report is no evidence. But I understand that the report of the Naib Tahsildar was admitted in evidence, though the Naib Tahsildar was not examined, nor did he personally know what had actually happened when the chaprasis

1916

EMPEROR v. AIJAZ HUSAIN.

went to arrest the accused. Four chaprasis had been entrusted with the execution of the warrant.

Upon those facts the accused has been convicted of an offence under section 225 B of the Indian Penal Code. The case was tried summarily. No evidence has been recorded. The learned Magistrate sets out in detail the case for the prosecution and concludes by saying:—"I find the charge against him proved." He has not found what exactly was the evidence in this particular case. The accused appears to be an influential zamindar. For some reason or other the chaprasis were unable to find him out before the 29th of November, and another co-sharer who had already been under arrest was asked to trace him out. It was in his company that the chaprasis went to arrest the accused. I think an officer armed with a warrant of arrest should have produced the warrant before the person sought to be arrested and made an attempt to arrest him, and if he had in fact offered resistance then he certainly would have been guilty of an offence under section 225 B of the Indian Penal Code. I suspect that the chaprasis were more or less friendly with the accused. They did not perform their duty by proceeding to arrest him. I do not understand what the expressions "*amadah faujdari hue*" or "*arrest me, if you can, I won't go*" were actually meant to convey. To constitute an offence under section 225 B something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest is required. The learned Magistrate in his explanation says that the accused bears the reputation of a pugnacious man. That may be so. There is apparently no evidence on the point. I think the four chaprasis entrusted with the execution of the warrant, for some reason best known to themselves, failed to arrest the accused formally and reported what is endorsed on the warrant. I think in a serious case like this, if the facts mentioned were true a charge ought to have been framed against the accused and the accused tried in the ordinary way and not summarily. I am not satisfied and I agree with the learned Sessions Judge in this matter, that there was any resistance or obstruction offered in fact to the arrest of the accused. The fact is that the

chaprasis did not attempt to arrest him I therefore accept the reference, set aside the conviction and sentence of the accused and direct his immediate release.

1916

EMPEROR v. AZAZ HUSAIN.

Conviction set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

1916 *May*, 26.

DHANRAJ SINGH AND OTHERS (DEFENDANTS) *v.* LAKHRANI KUNWAR (PLAINTIFF)*

Decree for possession—Decree-holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger where applicable.

The doctrine of merger does not apply to a decree for ejectment. If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees.

Plaintiff obtained a decree for possession of certain immovable property which she did not put into execution for over three years, but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession.

Held, that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession.

Quære, whether a suit is maintainable upon a decree when the execution of it has become time-barred.

THIS was an appeal under section 10 of the Letters Patent from the following judgement of a single Judge of this Court in which the facts of the case are fully set forth :—

"This appeal raises at least one very interesting question of law, about which I feel considerable doubt, but I do not think I should gain anything by taking time to consider my judgement. I am glad to think that my decision can be reviewed, if so desired, under the Letters Patent.

"The action is brought by the plaintiff for possession of certain property which belonged to her husband as a separated Hindu. Her husband died in 1904. She brought a suit for possession against the defendant in 1907 and succeeded in the first court. That judgement was affirmed by the appellate court in November, 1907. The defence had been that the land had been given orally to the defendant by the plaintiff's husband. That defence failed. It was also alleged that the defendant had been in continuous possession since 1896, but of course that would have given the defendant no right in itself. The judgement

* Appeal No. 7 of 1916, under section 10 of the Letters Patent.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

of the appellate court was appealable to the High Court, but was not appealed against. That is a decision between the present plaintiff and the present defendant that the plaintiff was entitled to the property in question and was also entitled to immediate possession in 1907. The question of title, therefore, between the parties is *res judicata*. The plaintiff applied for execution of the decree which had been given in her favour in the court of first instance, in September, 1913. That application was not unnaturally rejected by the Munsif on the 10th of January, 1914, on the ground that it was made more than three years after the decree and was therefore time-barred. Between 1907 and 1913 something appears to have happened to which I will refer later in my judgement. Upon her application being thus rejected, the plaintiff brought this suit on the 26th of February, 1914, and obtained a decree for possession in her favour on the 28th of April, 1914, in the Munsif's court. That decision was reversed in appeal by the District Judge on the 8th of June, 1914, and from that latter decision this appeal is brought.

"Now the plaintiff in this suit undoubtedly alleged a cause of action founded upon the decree of 1907. It also alleged, for some reason or another, a right of action accruing in 1905. That was clearly wrong because any cause of action anterior to the judgement of 1907 was merged in the judgement. It also alleged in paragraph 2 that the plaintiff could not obtain possession within three years of the decree, and it did not allege that the plaintiff had in fact been in possession at any time between 1907 and the commencement of this suit. So that when the case came before the court of first instance, the sole cause of action alleged, which the defendants had any reason to anticipate would be urged against them, was the previous decree. However, as appears from the judgement of the learned Munsif and from the extracts of evidence read by the respondent's counsel to me, it happened that during the hearing of the suit, five days prior to the decision, a witness gave evidence that the plaintiff had been in possession of the land in dispute a year after the decree, viz. in 1908. It is perfectly true, as I have pointed out, that no reliance had originally been placed by the plaintiff upon that fact. It must have taken the defendants and their pleaders by surprise, and it was clearly a matter in which in justice to the defendants (if the defendants and their pleaders had desired it) they ought to have been given any further opportunity which they reasonably asked to meet that further allegation. They do not appear to have done so, but one of the defendants Dhaiam Singh himself went into the witness-box and contradicted the witness. The learned Munsif was unable to accept the evidence of this defendant and gave excellent reasons for accepting the evidence given by the witness to whom I have referred, and he held as a fact, after hearing the evidence on both sides on a point, which, as I have said, had not been raised in the plaint, that the plaintiff had been in possession of the land within twelve years, viz. in 1908. In my opinion if that happened it was a satisfaction of the decree and a fresh cause of action would accrue to the plaintiff, if at any time, subsequent to that, the defendants retook possession. It was alleged by the same witness to whom I have referred, called by the plaintiff, that the defendants did retake possession, although that statement does not

appear in the learned Munsif's judgement, but was read to me by the respondent's counsel. Now there are cases, no doubt, in which parties are taken by surprise and in which it is unjust to allow their rights to be defeated by proof of matters which are not alleged and which they have no opportunity of meeting. On the other hand, it is undesirable in the interests of justice, where no injustice will otherwise be done to anybody, that a court should wilfully shut its eyes to relevant facts which are proved in the course of the hearing, raising cognate, though different, cause of action to that originally relied upon by the plaintiff. Everybody knows that it may occur that in the early stages of a case, the facts are not known to the pleader who draws out the plaint, and every risk of injustice can be avoided by allowing an adjournment, by raising the point on appeal, or by penalizing the successful party in costs. In this particular case the defendants appealed. Upon the hearing of the appeal it was open to them to raise any question of law or to point out to the appellate court any unjust consequences which had ensued to them arising out of the admission of the evidence to which I have referred and the finding at which the learned Munsif arrived. They advanced six grounds of appeal, but they took no point about this alleged injustice. The finding of fact to which I have referred is not dealt with at all in the judgement of the lower appellate court and must be taken, therefore, not to have been overruled. It, therefore, stands as a finding of fact by which I am bound, as to which it would be a great misfortune, in my opinion, if I were not entitled to take notice of it, and which, in my opinion, entitled the plaintiff to succeed. I do not think that, under the circumstances of the case, I should be doing right if I sent the case back or referred any further issue on this point. On that single ground therefore I allow this appeal and give judgement for the plaintiff. To put the matter in right form I re-settle an issue under order XLI, rule 24, to the following effect:—"The plaintiff while in possession of the land in question in 1908, was wrongfully dispossessed by the defendant," and I hold that the plaintiff is entitled to succeed on that ground.

"There is, however, another point to which I have already referred which is raised by this appeal, namely, even if the plaintiff was not entitled to have the fact of physical possession in 1908, found in her favour in this suit and to recover judgement upon her dispossession, whether she is not entitled to such as she originally did, and to succeed, upon the decree of 1907. That is a question which is by no means free from difficulty. There has been a considerable amount of discussion upon it in one form or another and some divergence of judicial opinion, but I do not think it desirable to go at length through all the decisions on the point. I would first refer to a decision by WILSON, J. in *Atkinsoney Doisee* v. *Harry Dois Dutt* (1) which commends itself to my judgement and to certain observations contained in a recent judgement of two Judges of the Calcutta High Court, *viz.*, *Kali Charan Nath* v. *Sukhoda* (2). Most, if not all, of the cases are set out in that judgement. The passage *Sundari Debi* to which I would refer is at the end of the judgement on page 62 being a passage cited from the judgement Baron Parke in *Williams* v. *Jones* (3)—"The

(1) (1881) I. L. R., 7 Calc., 74. (2) (1915) 20 C. W. N., 58.

(3) (1845) 13 M. and W., 628.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

principle is that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgement may be maintained." The Calcutta High Court goes on to say:—"No mischief can result from the acceptance of this principle, if it is adopted, subject to the qualification recognized in modern English Law, viz. that an action is permissible only where the judgement cannot be enforced in some other way." The only other case I need refer to is a decision of the Chief Justice of Bombay in *Manicharam Kalliandas* v *Bakshi Sahebji* (1). In that case the Chief Justice appears to me to have recognized the principle that judgements and decrees may be sued upon when it is the only practicable remedy open. Now I take my stand upon the broad principle that a judgement, certainly in a contract case, I think in all cases, is a contract of record. By the comity of nations most countries recognize the judgements of foreign countries and give effect to them by allowing suits to be brought upon them provided they are delivered by courts of competent jurisdiction acting within that jurisdiction and lay down no principle repugnant to the policy of what I may call the domestic country. It would appear that domestic judgements ought to have at least the same force as foreign judgements. It would also appear from a decision which was much relied upon by the respondent's counsel, viz. *Fakirappa* v *Pandurangappa* (2) that countless actions have been brought at any rate in Bombay on Small Cause Court judgements or decrees. It is, therefore, as it seems to me, difficult to hold that a suit, upon domestic judgement of some kind or another, is not cognizable under the Code in this country. Some limit of course there must be and it is obvious that whichever way this case is decided there must be some conflict of what I may call equitable doctrines.

The period for enforcing a decree by article 182 of Act IX of 1908 is three years and it is urged with great force that to give effect to a suit upon a decree which is brought within 12 years under article 122 is directly in conflict with article 182. On the other hand to refuse to give effect to a suit upon a decree for the recovery of possession of land after the expiration of three years would be in conflict with article 122 and also, as was pointed out by the appellant's counsel, with section 28 of the Limitation Act. It is not immaterial that the Limitation Act itself in article 132 recognizes—of course it does not enact—the admissibility of judgements obtained in British India as a cause of action under the Code. Mr. *Agarwala* for the respondent's argued with great force that there was a wide distinction between a judgement and a decree. So there, of course, is. I am of opinion that the word judgements contained in article 122, means 'decrees.' The word "obtained" is not really applicable to the reasons which a judge gives in his judgement, it is more applicable to the decree which a successful party gets in his favour and it appears that in two places in section 5 of the Limitation Act the word 'judgement' is used in the sense in which decree is defined by the Civil Procedure Code. Now the question still remains whether there is anything in the Code itself which indicates that such suits are not admissible in this country. Before I refer to the sections

(1) (1869) 6 Bom. H. C. R. 231 (234). (2) (1868) I. L. R., 6 Bom., 7.

which are relied upon I would observe, what I have already pointed out, that if the *Code* did contain anything expressly or impliedly excluding from the consideration of the courts in this country suits upon decrees then for many years past, some, if not all, of the High Courts in this country have been decreeing suits upon decrees without any jurisdiction at all. The first section relied upon is section 11 and at first sight it would seem clearly to prohibit the relitigation of any question which had already been determined in any suit, that is to say, it seems to me to go further than the principles of *res judicata* founded upon the *Duchess of Kingston's* case, and leads as if no party not even a plaintiff can sue upon any matter which has been determined. I think the answer is that the plaintiff in such a case as this is not suing upon the same cause of action, he is alleging that he has obtained a decree and that defendant is under a legal obligation to him under that decree and that obligation arises out of matters subsequent to those litigated in the original suit. A decree determines questions between parties in litigation at the commencement of the suit, the plaintiff here is relying upon something in his favour at the end of the suit and independent of the question originally litigated. Indeed questions originally litigated cannot be reconsidered in the suit upon the decree and that is all that section 11 provides.

"Section 12 was also relied upon and I therefore refer to it, but it is obvious that it relates only to cases where the plaintiff is in default under the rules contained in the schedule, or has brought a suit and has been non suited, and it does not bear upon the question now before me.

"Lastly, section 47 has been relied upon, and indeed it has been in many judgements dealing with this matter a prominent subject of discussion under the name of section 244 of the old Code. As the section now stands it reads — "All questions arising between the parties to the suit in which the decree was passed, and relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." To my mind the question whether a judgement can be sued upon in a court of co-ordinate jurisdiction or not, is a totally different question to those which are dealt with by this section. Such a suit does not and could not relate to the execution, discharge, or satisfaction of a decree and with great respect to the Judges who have dealt with this question, this section in my opinion, has nothing whatever to do with a suit of the present nature. Finding therefore nothing in the Code which prohibits the entertainment of such a suit, and finding that suits have been entertained over and again in one form or another, and finding that the period for enforcing this decree has expired and that therefore the plaintiff has no other practicable remedy, I think the plaintiff was entitled to bring the present suit on the second ground as well. I therefore allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff will get her costs in all courts."

Babu *Girdhari Lal Agarwala*, for the appellants.

Dr *Surendro Nath Sen*, for the respondent.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

RICHARDS, C.J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for possession of certain immovable property. The plaintiff obtained a decree for possession of this very land in 1906. On appeal this decree was confirmed. Admittedly the plaintiff did not obtain possession through the court, and when she made an application for execution of the decree, her application was rejected on the ground that the decree was more than three years old. She then instituted the present suit. In the court of first instance she succeeded in obtaining a decree. On appeal the learned District Judge held that, not having executed the decree within three years, her suit was barred by the provisions of section 11 of the Code of Civil Procedure, and also by the provisions of section 47 of the Code of Civil Procedure. In second appeal to this Court, the learned Judge reversed the decree of the lower appellate court and restored the decree of the court of first instance. An issue was framed in the court of first instance as to whether or not the plaintiff had been in possession within twelve years. It was of course necessary from every possible aspect of the case for the plaintiff to prove that she had been in possession within twelve years of the institution of the present suit. The mere fact that she had obtained a decree for possession of the land would not, in our opinion, entitle her to get possession in the present suit if she had never been in possession within twelve years. Two witnesses were produced who deposed for and against the alleged possession of the plaintiff, one witness for the plaintiff and the defendant for himself. The plaintiff's witness was Ram Dawan Singh. He deposed that a year after the decree had been obtained the plaintiff got possession and that she was subsequently put out of possession by the defendant. He mentioned that she had cultivated the land. The defendant stated that he has been for eighteen years in possession and that he had cultivated the land himself and by tenants. His evidence was somewhat vague. The learned Munsif says, in dealing with the witness Ram Dawan Singh, that no connection of this witness with the plaintiff and no enmity with the defendant is shown or proved. He then points out that the defendant is an interested witness and that he places no reliance on his statement and then he says he believes the witness

1916

DHANRAJ SINGH v. LALBHANI KUNWAR.

for the plaintiff. In the memorandum of appeal no specific ground was taken against the finding of the Munsif that the plaintiff had been in possession within twelve years. Now the only evidence of her possession was the evidence of this witness and the possession he proved was possession after the decree; therefore when finding that she was in possession within twelve years the Munsif must have found that she was in possession after the decree. The learned District Judge arrived at no finding on this point. He decided the case against the plaintiff purely on the question of law. The learned Judge of this Court considered that he was bound by the finding of the Munsif on the question of fact. This, we think, was wrong. He was entitled either to refer an issue on this question of fact or he might have exercised the powers conferred on the High Court under section 103 and decided the issue himself. We consider that this is an important issue. We consider that it is a fit case for this Court to exercise the jurisdiction it has under section 103. The evidence is on the record and is sufficient to enable us to decide the issue. The learned Munsif had the advantage of hearing and seeing the witnesses on this point. He believed the witnesses for the plaintiff and has given reasons for believing them. Furthermore there is considerable probability that the evidence is true. After the plaintiff had finally got a decree for possession in 1907, it is improbable that she would have remained absolutely quiet for three years unless she had got into possession of the property. It is also probable that the defendants would not have resisted her in getting possession at first, though it is quite likely that, finding her a defenceless woman, they would have gradually attempted again to dispossess her. This is really what we believe actually happened. We find upon the evidence that the plaintiff did get into possession after the decree. On this finding of fact it seems to us that the plaintiff had a cause of action irrespective of the previous decree. The previous decree would no doubt be part of her title. We do not think that the mere fact that she obtained a decree for possession in 1907, would prevent her again suing for possession if her possession was again interfered with, nor do we think that the doctrine of merger applies to decrees for ejectment. No doubt, if a party obtains a decree for

1915

DHANRAJ SINGH v. LAKHRANI KUNWAR.

a debt or for damages for tort, the original cause of action merges in the decree. But a decree in ejectment differs very much from other decrees. In Broom's Legal Maxims, second Edition, page 251, in dealing with ejectment under Maxims "*Nemo debet bis vexari pro una et eâdem causâ*" the learned author says:—"With respect to the action of ejectment, we may further specially remark that by the judgement in this action the lessor of the plaintiff obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had; if therefore he had previously a freehold interest in them, he is in as a freeholder, if he had a chattel interest, he is in as a termor, and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner, without any re-entry on his part. Moreover, although it has recently been decided that a judgement in ejectment is admissible in evidence in another ejectment suit between the same parties, yet it is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another. Neither can a judgement in ejectment be pleaded by way of estoppel, because the defendant is bound by the terms of the consent rule, to plead not guilty, hence there is a remarkable difference between ejectment and other action with regard to the application of the maxim under consideration." It seems to us that if the plaintiff had got formal possession in execution of her decree and her possession was again interfered with by the defendants she has a right to bring a fresh suit. If she succeeded in getting possession without applying to the court, we see no reason why she should not be in as good a position as if she had got formal possession through the court. What we have said above is sufficient to dispose of the appeal. The learned Judge of this Court, however, seems to have held that the plaintiff's cause of action merged in the decree and then to have considered that it is always open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has become incapable of execution by lapse of time. This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is very alarming situation. It is difficult to understand why the

1916

DHANRAJ SINGH v. LAKHBANI KUNWAR

Legislature should have expressly limited the time within which a decree can be executed and at the same time allow decree-holders to bring suits upon decrees thereby putting the parties to extra expense and vastly extending limitation. With regard to ordinary decrees we think that section 47, which provides that no separate suit shall be brought in respect of matters relating to the discharge of decrees, prevents a fresh suit being brought upon a decree. We do not think it necessary to say anything further on the point, first, because it is not necessary for the decision of the present case, and, secondly, because the question has not been fully argued before us. In view of our finding on the issue as to possession and our view of the law we dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sundar Lal.

1916
May, 26.

EMPEROR v GAYA BHAR.*

Act No. XLV of 1860 (Indian Penal Code), section 450—Lurking house trespass—Entering a house with intent to have illicit intercourse with a widow of full age no offence.

An accused person, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of a house, cannot be said to have intended either actually or constructively to cause such annoyance.

Where, therefore, it was proved that a person entered a house with intent to have illicit intercourse with a woman who was a widow and of age, *held* that he was guilty of no offence. *Jiwan Singh* v. *King-Emperor* (1) dissented from. *Emperor* v. *Mulla* (2) referred to. *Queen-Empress* v. *Bajapadayachi* (3) followed.

THE parties were not represented.

The facts of this case are fully set forth in the judgement of the Court.

SUNDAR LAL, J.—This is a reference made by the Sessions Judge of Gorakhpur. It appears that the accused went to the place of one Sarju to have illicit connection with Sarju's sister. He was arrested and on prosecution was convicted by Pandit

* Criminal Reference No. 326 of 1916.

(1) Punj. Rec., 1908, Cr. J., 54. (2) (1915) I. L. R., 37 All., 365.

(3) (1896) I. L. R., 19 Mad., 249.

1916

EMPEROR v. GAYA EHAR

Gur Saran Newas Misra, a Magistrate of the first class, of an offence under section 456 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one month. The learned Magistrate found that there had been illicit intercourse between the woman and the accused and that the woman was a widow The question is whether the accused is guilty of an offence under section 456 of the Indian Penal Code. Section 456 refers to an offence of lurking house-trespass and section 441 defines the offence of criminal trespass. Under section 441 of the Indian Penal Code, whoever enters into or upon property in the possession of another (*a*) with intent to commit an offence or (*b*) to intimidate, insult or annoy any person in possession of such property . . shall be held to be guilty of an offence of criminal trespass It has been found by the Magistrate that there was illicit intercourse between Sarju's sister and the accused. As she is a widow and of age, to have illicit intercourse with her is no offence under the criminal law, and it cannot be said that the accused went to Sarju's house with the intent of committing any offence so far as this part of the case is concerned. It has been said that at any rate the accused must have known that Sarju would be much annoyed and would feel greatly insulted by the visit of the accused for the purpose of having sexual intercourse with his widowed sister and therefore the accused's conduct fell under section 456 of the Indian Penal Code The learned Sessions Judge is of opinion that offence under section 456 has not been made out. The Punjab Chief Court in a recent case of *Juwan Singh* v. *King-Emperor* (1), has held that under these circumstances the accused was guilty of criminal tresspass. In that case Mr. JUSTICE CHATERJEE came to this conclusion after finding that "Musammat Mehro denies the intrigue, and the first court has not found it to have existed and the view of the learned Judge in regard to its existence is not well supported." Upon these findings it was unnecessary to decide the point Mr. JUSTICE CHATERJEE, however, held that the house in question did not belong to Musammat Mehro, but to her brother, and that illicit intercourse was bound to cause annoyance to the brother and he therefore upheld the conviction. I am unable to accept that view. In the case of *Queen-Empress* v. *Rayapadyachi* (2) Mr. JUSTICE SHEPHARD

(1) Punj. Rec., 1903 Cr. J., 54
(2) (1896) I. L. R., 18 Mad., 240

1916

EMPEROR v. GAYA DIHAL.

and Mr. JUSTICE DAVIS in a case like this observed as follows :— "In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent, and does not, as other sections do (*e.g.* section 425), embrace the case of an act done with knowledge of the likelihood of a given consequence." The view taken by the Madras High Court seems to me to be the correct view applicable to a case like the one before me. The learned Magistrate in his explanation has relied upon the case of *Emperor* v. *Mulla* (1). In that case the accused was found inside the complainant's house at 2 a.m. He could not give any explanation of his presence. Mr. JUSTICE KNOX held that in the absence of any particular intention the accused must be held under circumstances to have entered the house with the object of committing an offence. In the present case, however, the intention with which the accused entered the house has been clearly proved. Similarly in the case of *Koilash Chandra Chakrabarty* v. *The Queen-Empress* (2) and of *Premanundo Shaha* v. *Brindabun Chung* (3), the accused was found in the middle of the night in a room occupied by respectable ladies. There was no evidence that he had an intrigue with any one of them and on an alarm being raised the accused attempted to escape. It was held that the accused must be deemed to have entered the house with the object of committing an offence. I agree with the view taken by the learned Sessions Judge and following the Madras ruling above referred to, I hold that it has not been proved that the accused entered the house with the intention of committing an offence and that the intention with which he went to Sarju's house namely to carry on intrigue with his sister, even when discovered, cannot be said to have caused such annoyance or insult as is contemplated by the section. I set aside the

(1) (1915) I. L. R., 37 All., 395. (2) (1885) I. L. R., 16 Calc., 637.

(3) (1895) I. L. R., 22 Calc., 994.

1916

EMPEROR v. GAYA BHAR,

conviction and the sentence and direct that the accused be forthwith released.

Conviction set aside

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Lindsay

1916 *May*, 27.

KASTURI (DEFENDANT) v. PANNA LAL (PLAINTIFF) *

Hindu Law—Marriage—Marriage of Hindu girl contracted by maternal uncle in the presence of paternal relatives—Injunction obtained by disqualified paternal relative to stay the marriage without reasonable and probable cause—Maintainability of suit for damages.

According to Hindu Law so long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage, but in cases where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl.

A Hindu girl who was living with her paternal aunt and paternal uncle was made over to her maternal uncle as the result of an agreement come to between the parties. Subsequently the paternal aunt applied to be appointed guardian of the person of the minor, which application was dismissed. After this the maternal uncle of the girl arranged for the marriage of the girl with a certain person. The paternal aunt then obtained a temporary injunction and got the wedding put off. The marriage, however, was accomplished with the person selected by the maternal uncle. The maternal uncle brought a suit to recover damages for the loss caused to him by the wrongful issue of the injunction and the postponement of the wedding. *Held* that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, and a suit for damages lay. *Kastur* v. *Chiranji Lal* (1) referred to.

THE facts of this case were as follows:—

One Musammat Chandrakala, an orphan of about 13 years of age, lived with her paternal uncle's widow, Musammat Kasturi and another paternal uncle Ram Jiwan and his son Lalta Prasad. A complaint was lodged against them in the criminal court alleging that they were detaining the girl against her will and preventing her from going to live with her maternal uncle, Panna Lal. The matter was compromised on the agreement that she was to be allowed to go and live with Panna Lal. Thereafter she lived with Panna Lal. He negotiated a marriage for

* First Appeal No. 20 of 1916, from an order of Durga Dat Joshi, first Additional Judge of Aligarh, dated the 15th of January, 1916.

(1) (1913) I. L. R., 35 All., 265.

her which was to take place on the 17th of June, 1915. A few days before this date Musammat Kasturi applied to the District Judge to be appointed guardian of the person of Musammat Chandrakala and also applied for an injunction against Panna Lal stopping the marriage. The Judge granted a temporary injunction and the marriage was stopped. Eventually Musammat Kasturi's application for guardianship was dismissed, the temporary injunction cancelled and the marriage performed on a subsequent date. Panna Lal then brought a suit against Musammat Kasturi for damages sustained by him in consequence of the upsetting of the arrangements for celebrating the marriage on the 17th of June, 1915. His case was that Musammat Kasturi had obtained the injunction without right and without probable and sufficient grounds. The main defence was that Panna Lal had no right whatever to enter into any contract of marriage on behalf of the girl, and so he had no cause of action for the suit. The Munsif tried all the issues arising in the case, with the exception of the one relating to the amount of damages, and dismissed the suit on the grounds that Panna Lal had no right to settle the marriage in supersession of the paternal relations of the girl and that Musammat Kasturi had not obtained the injunction in bad faith. The lower appellate court reversed these two findings of the Munsif and remanded the suit under order XLI, rule 23, for trial *de novo*. The defendant appealed against the order of remand.

Munshi *Panna Lal* (with him Dr. *S. M. Sulaiman*), for the appellant :—

The order remanding the suit under order XLI, rule 23, is bad in law. The parties produced evidence on all the issues. The court of first instance considered and decided all of those issues, excepting that which related to the measure of damages. Under these circumstances it cannot be said that the case was decided on a preliminary point, and the lower appellate court was not justified in remanding the suit for a trial *de novo*. Among the list of persons entitled under the Benares School of Law to give a girl in marriage no place is assigned to the maternal uncle by Yajnavalkya or by the Mitakshara. Even according to Vishnu and Narada Smritis the maternal grandfather and the maternal uncle come in after the paternal uncle and other

1916

KASTURI v. PANNA LAL.

paternal relation (*Sakulya*). Hence, so long as there is a paternal uncle or other paternal relation who comes within the category of a *Sakulya*, the maternal uncle of a girl is not competent to give her in marriage. Reference was made to the case of *Kasturi* v. *Chiranji Lal* (1). Panna Lal, therefore, had no right to settle the marriage of Musammat Chandrakala, in presence of her paternal uncle, Ram Jiwan and of his son, Lalta Prasad. The lower appellate court has found that Ram Jiwan was an outcaste, although the plaintiff had not come forward with that allegation That fact, however, would not make the position of Panna Lal any better, for Lalta Prasad had a preferential right over him. The effect of the compromise was merely to allow the girl to go to her maternal uncle It did not and could not transfer to him the right to give the girl in marriage. Her marriage had been arranged by Musammat Kasturi in consultation with Jiwan and Lalta Prasad. In negotiating a different marriage Panna Lal could not be deemed to have acted with the consent of the paternal relations. He was doing an unlawful and unauthorized act on his own intiative and he cannot claim damages for being prevented from doing it.

Munshi *Gokul Prasad*, for the respondent:—

It is not disputed that, ordinarily, a qualified and competent paternal relation has a preferential right of bestowing a girl in marriage over a maternal relation But this right may be lost by a variety of circumstances. For example, if the paternal relations are incompetent or disqualified persons, or they neglect or refuse to do their duty, or arrange an unsuitable or improper match, or delegate their powers, the maternal relations become entitled to act. Having regard to the circumstances that, as the result of the compromise in the criminal case, the girl herself and all her property passed out of the control of the paternal relations into that of Panna Lal, that Ram Jiwan was an outcaste and so disqualified to act and that no objection had been raised to the proposed marriage, it cannot be said that Panna Lal was incompetent to enter into the contract of marriage for the girl. Panna Lal's act in negotiating the marriage was not such an improper or illegal act as would *ipso facto* vitiate or avoid the

(1) (1913) I. L. R., 35 All., 265.

transaction; it has been found that the match was a suitable one and that he was not acting from any bad motive. In any case Musammat Kasturi comes nowhere within the enumerated classes of relations who have a right to bestow a girl in marriage. She might possibly have such a right if her application for guardianship had succeeded; but that application was dismissed. She had no right whatever to stop the marriage either personally or through the instrumentality of an injunction order obtained by her. She is therefore liable for damages caused by her unlawful interference. In this view it is immaterial whether Panna Lal was or was not aware of any negotiations which the others might have been carrying on for the marriage of the girl. Having regard to the findings of fact that the marriage arranged by Panna Lal was a suitable one and that there was no bad faith, Musammat Kasturi acted without reasonable and probable cause in applying for the injunction.

As to the question whether the remand could or could not be made under order XLI, rule 23, the case of *Mata Din* v. *Jamna Das* (1), supports the order passed by the lower appellate court.

Munshi *Panna Lal*, was heard in reply.

PIGGOTT and LINDSAY, JJ.:—This is an appeal against the order of the First Additional District Judge of Aligarh passed in an appeal which was brought by the plaintiff respondent Panna Lal against a decree of the Munsif of Bulandshahr. The order which is complained of is one purporting to be under order XLI, rule 23, of the Code of Civil Procedure. The learned Additional District Judge has ordered the case to be remanded for trial, as he says, *de novo*, to the court of first instance. The defendant Musammat Kasturi has appealed against this order and the memorandum of appeal raises two questions, one relating to the form of the order passed by the court below and the other, a more important one, relating to the competence of the plaintiff Panna Lal to maintain this suit. We will deal first with the second question and in order to understand the matter at issue we may state the following facts. There were three brothers, Raghunandan Lal, Mahadeo Prasad and Ram Jiwan Lal. Of these Raghunandan Lal died in the year 1910, leaving a widow Musammat Ram

(1) (1905) I. L. R., 27 All., 691.

1916

KASTURI v. PANNA LAL.

Piari, who died after him in the month of June, 1914. Raghunandan Lal also left a daughter, Musammat Chandrakala, with whose affairs we are concerned in the present case. Mahadeo Prasad, another of the brothers, died in the year 1912, and his widow Musammat Kasturi is the appellant before us. The third brother Ram Jiwan Lal was alive at the time this suit was brought; he died during the pendency of the suit and is now, it is said, represented by his son, Lalta Prasad. It appears that after the death of her father the girl Chandrakala whose age is now about 13 or 14 years lived with her aunt, the appellant Musammat Kasturi. It is also said that Ram Jiwan Lal, the brother of the girl's father, lived in the same house. In the month of January, 1915, a complaint was made in the Criminal Court by one Rameshwar who had been married to an elder sister of the girl Musammat Chandrakala. The application was under section 522 of the Code of Criminal Procedure and was directed against Musammat Kasturi, Ram Jiwan Lal and the latter's son, Lalta Prasad. The allegation made in the Criminal Court was to the effect that these three persons were detaining the girl Chandrakala in their house against her will and were preventing her from going to live with her maternal uncle Panna Lal, who is the respondent in the present appeal. This dispute was put an end to in the month of January, 1915. A petition was filed before the Criminal Court in which it was stated that, by reason of the intervention of certain friends of the family, the parties had settled their dispute and the three accused persons had agreed that the girl was to go and take up her residence with her maternal uncle, Panna Lal, and that she was to be allowed to take her property with her. After the girl went to live with Panna Lal it appears that Panna Lal entered into a contract of marriage on her behalf with Rameshwar, who was the husband of the girl's deceased sister. Panna Lal, it is said, made all the arrangements for her marriage with Rameshwar and the 17th of June, 1915, was fixed as the date of marriage. A few days before the date Musammat Kasturi, the appellant, went to the District Judge of Aligarh and put in a petition asking that she might be appointed guardian of the person of the girl, Chandrakala. Simultaneously with this petition Musammat Kasturi filed another

1916

KASTURI v. PANNA LAL.

petition in which she asked the court to issue an injunction restraining Panna Lal from having the marriage of the girl with Rameshwar performed on the 17th of June. A temporary injunction was issued by the District Judge, and the result was that Panna Lal was obliged to put off the marriage. The consequence of this is that present suit has been brought by Panna Lal in which he claims Rs. 1,000, as damages, on the allegation that the injunction which was sought against him by Musammat Kasturi was improperly sought and obtained and that by reason of postponement of the marriage he suffered damages, having made a number of costly arrangements for marriage ceremony. We may mention at this stage that since the 17th of June, 1915, the girl has as a matter of fact been married to Rameshwar, the man with whom the marriage contract had been made. The defence of Musammat Kasturi to this suit was to the effect that Panna Lal had no right whatever to enter into any contract of marriage on behalf of the girl, and that consequently it could not be said that she had applied for the injunction without reasonable and probable cause. In short her case was that Panna Lal had no cause of action for the suit.

The Munsif before whom the case was tried framed six issues. The first of these was whether or not the plaintiff had got any cause of action for the suit and was he entitled to maintain it. On this point the Munsif's finding was that the temporary injunction which was issued had given rise to a cause of action upon which the suit could be maintained, provided the plaintiff could show that he had suffered damage. The second issue was whether or not the plaintiff had any power to arrange the marriage of Musammat Chandrakala. On this point, after referring to certain authorities on Hindu Law, the Munsif was of opinion that the plaintiff had no right to make a contract of marriage in the presence of paternal relations. On the third issue the Munsif held that, assuming the plaintiff had authority to settle the marriage, it was not an unsuitable or improper one, although, as he said, the man Rameshwar with whom he contracted the marriage, was of no better status than one Piari Lal with whom, it is said, a previous arrangement for marriage had been made.

1916

KASTURI v. PANNA LAL.

The fourth issue was whether the defendant obtained the injunction on wrong allegations and with a view to cause loss to the plaintiff. On this point the Munsif's finding was in favour of the defendant. He was not satisfied that the defendant obtained the interlocutory injunction in bad faith. Having decided these four issues the Munsif dismissed the case. He left undetermined two issues relating really to the amount of damages suffered by the plaintiff.

The fifth issue reads "Has the plaintiff suffered any loss owing to the injunction?" and the sixth issue reads "If yes, how much?"

On appeal the learned Additional District Judge has reversed the decree of the first court. He held that in the circumstances, which were made to appear in this case the plaintiff Panna Lal had authority to contract a marriage on behalf of the girl Chandrakala. He was also of opinion that Musammat Kasturi had no reasonable and probable cause for seeking this injunction from the Civil Court, and as a consequence of these findings he held that the Munsif should be directed to try out all that was left to be decided, viz the amount of damages which was payable to the plaintiff. As regards the question of Panna Lal's authority to contract the marriage on behalf of the girl, it has been contended before us that, in the presence of paternal relations of the girl, Panna Lal, who is only the girl's maternal uncle, had no right to enter into this contract of marriage. There seems to be no dispute as to the law on the subject, and all the authorities have been referred to in a decision of this Court which is reported in *Kasturi* v. *Chiranji Lal* (1). There can be no doubt that so long as there are competent paternal relatives in existence the maternal relatives of a girl have no authority to give her in marriage, and so *prima facie* it would appear that in the presence of Ramjiwan Lal, who was the girl's paternal uncle, Panna Lal had no power to arrange for her marriage to Rameshwar. It may, however, happen that the maternal relatives do acquire authority to contract the marriage on behalf of a girl, *e.g.* in cases where the paternal relatives refuse to act or have disqualified themselves from acting. And it is probably on this ground that the learned Additional District Judge came to the conclusion that Panna Lal

(1) (1905) I. L. R., 27 All., 265.

had in the circumstances of the case good authority to arrange for the girl's marriage. He pointed out that Ranjiwan Lal, the only surviving paternal uncle of the girl, was an outcaste and also referred to the fact that no objection had been raised to the proposed marriage. He further pointed out that in any case the defendant Musammat Kasturi was in no sense a really legal guardian of this girl under Hindu Law. We may refer again to the proceedings which were taken in the Criminal Court and which terminated with the compromise of the 15th of January, 1915. It seems to us that in view of those proceedings it is no longer open to Musammat Kasturi, or to the paternal relatives of the girl, to say that Panna Lal had no authority to act on the girl's behalf in this matter. We treat this compromise of the 15th of January, 1915, as amounting to an abdication of their functions by the paternal relatives. Ram Jiwan Lal, the girl's paternal uncle, and her cousin Lalta Prasad, the son of Ramjiwan Lal, were both parties to the compromise, and if, as stated in this compromise, they had decided on the advice of their own friends to surrender the girl to the guardianship of Panna Lal, we think it is no longer open to them, or to Musammat Kasturi either, to put up the case that Panna Lal had no authority to enter into this arrangement of marriage. Again, it has been pointed out that before the girl was made over to the custody of her maternal uncle a marriage had been arranged for her by Musammat Kasturi with the consent, it is said, of Ramjiwan Lal, and it is argued that having regard to this fact, Panna Lal was not competent to go behind the previous arrangement for marriage and to enter into a new contract. Panna Lal's story was to the effect that he had no knowledge of the earlier arrangement. In the court of the first instance, at any rate, he pleaded denial of this fact. Be that as it may, it seems to us that the fact that the girl had been previously betrothed to a man named Pearey Lal would not under the Hindu Law constitute any legal obstacle to her being betrothed to another man, Rameshwar. It has been conceded that all that happens in a case of breach of contract of this kind is that one of the parties acquires a right to sue for damages for the breach of contract. So far as Musammat Kasturi is concerned we think that she is out of court altogether, for in no way can it be said that she had any authority, as the

1916

KASTURI v. PANNA LAL.

widow of the girl's paternal uncle, to make arrangements for the girl's marriage. No doubt if she had succeeded in obtaining from the court of the District Judge of Aligarh an order for her appointment as guardian of the girl's person she would then have been vested with full authority to make arrangements for the girl's wedding. Her application to be appointed guardian was dismissed, and it appears to us that when she made the application she had no status whatever upon the basis of which she was entitled to go to the District Judge and ask for the issue of this injunction No doubt in a case of this kind, which is based upon an allegation that the defendant has been guilty of abuse of process of the court, it is for the plaintiff to show that the defendant acted without reasonable and probable cause On the facts which have been set out, and about which there is really no dispute, it is proved to us that the plaintiff sufficiently made out a *primâ facie* case which threw upon Musammat Kasturi the burden of proving that she had reasonable and probable cause for the asking of this injunction. From what we have said it will be apparent that Musammat Kasturi had in fact no reasonable and probable cause for asking the District Judge to interfere in this matter And we are satisfied from the evidence before us that her interference in this matter was not *bonâ fide* in the interest of the girl. It is important to notice here that in the application which Musammat Kasturi filed for the purpose of obtaining the temporary injunction not a word was said regarding the previous marriage contract arranged between the girl, Chandrakala and the man Piari Lal, and so Musammat Kasturi cannot be heard to justify her action on the ground that she was asking the Judge for an order which would protect her from liability in case there were afterwards any suit for the breach of contract of marriage with Piari Lal. We have no doubt therefore that on this part of the case the conclusion arrived at by the lower appellate court is quite correct.

We have now to deal with the other point which has been raised in the case, viz. the form of the order by which the learned Judge has remanded the case back to the first court. We have pointed out that six issues were framed in the case and four of them were decided. The last two are really one issue, viz. the

amount of damages which the defendant is liable to pay to the plaintiff. We are told that both parties gave all the evidence at the trial which they desired to produce. In these circumstances we fail to see why the learned Judge thought it necessary to pass his order under order XLI, rule 23, instead of under order XLI, rule 25, the latter being on the face of it the more appropriate rule in this case. The Munsif had merely omitted to try the issue relating to damages. There is on the record all the evidence upon which a decision on this issue can be reached. We think therefore that the proper order which should have been passed in a case of this kind was one under rule 25 directing the first court to come to findings on the 4th and 5th issues and to report them to the lower appellate court. We do not of course go the length of saying that the order which has been passed by the learned Additional Judge is an illegal order. We have been referred to a decision of this Court *Mata Din* v. *Jumna Das* (1), in which it has been held that it is competent to an appellate court to remand a case under section 562 of the Code of Civil Procedure, where the court of first instance having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it leaving other issues undecided. The provisions of section 562 of the old Code, which corresponds with order XLI, rule 23, of the present Code, have received a liberal interpretation in this judgement. We are, however, dealing here in first appeal with an order of the learned Additional Judge and it is open to us to alter the frame of the order if we think there are good grounds for doing so. It may be observed here that the result of sending the case back under order XLI, rule 23, will only result in further expense to the parties.

One of the results will be that after the decision given by the court of the first instance there will be another appeal to the court of the Additional Judge. Now that the parties have laid all their evidence before the court, we fail to see why they should be subjected to the chances of further litigation than is necessary.

We, therefore, allow the appeal to this extent that for the order of the court below passed under order XLI, rule 23, we

(1) (1905) I. L. R., 27 All., 601.

1916

KASTURI v. PANNA LAL.

substitute an order under order XLI, rule 25. The court of first instance will be directed, upon the evidence already on the record, to come to findings on the fifth and sixth issues and to return its findings on those issues to the lower appellate court. The learned Additional Judge after considering the findings will proceed to dispose of the appeal according to law. As regards costs we think the respondent is entitled to his costs in this Court

Decree modified.

1916

May, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq

BHOJ RAJ (DEFENDANT) *v.* RAM NARAIN (PLAINTIFF)*

Pre-emption—Mortgage of property prior to the passing of Act No IV of 1882.—Government revenue paid by mortgagee—Liability of pre-emptor to pay the amount of the revenue as a condition precedent to obtaining possession of property.

Under a mortgage-deed the mortgagor was liable to pay the Government revenue, and if he failed to do so, the mortgagee was to pay it and was entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the revenue, which accordingly was paid by the mortgagee. Subsequently the property was sold to the mortgagee for the amount of the mortgage *plus* the amounts of the revenue paid by the mortgagee. In a suit to pre-empt this sale, *held* that the pre-emptor was bound to pay the amount paid by the mortgagee for the revenue as a condition precedent to his obtaining possession of the property as well as the amount of the mortgage.

IN this case the property in suit was mortgaged with possession so far back as 1873 to Bhoj Raj, defendant, for a sum of Rs. 3,000. There was a clause in the mortgage deed which was to the effect that the mortgagor would pay the Government revenue and if he failed to do so, the mortgagee would pay it and would be entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the Government revenue, and it was paid by the mortgagee. In the year 1911 the mortgagor sold the equity of redemption to the mortgagee, when the present suit to pre-empt the sale was instituted. The court of first instance decreed the suit: the lower appellate court modified the decree. The defendant vendee appealed to the High Court,

*Second Appeal No 1832 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 11th of September, 1914, modifying a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 20th of December, 1913.

1916

BHOJ RAJ v. RAM NARAIN.

where the question for decision was as to the liability of the pre-emptor to pay the whole of the sale money, which included the Government revenue paid by the vendee, in order to pre-empt the property.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for pre-emption. The first court decreed the claim, the lower appellate court modified the decree. The defendant vendee has appealed. It appears that as far back as the year 1873, the property was mortgaged with possession to the vendee. On the 19th of October, 1911, the mortgagor sold his equity of redemption to the vendee defendant for the sum of Rs. 8,000 This sum of Rs. 8,000 was made up of Rs. 3,000, the original money advanced on the mortgage and Rs. 5,000, Government revenue which the vendee said he had paid in respect of the property. The mortgage-deed contained a clause that the mortgagor would pay the Government revenue, and that if he failed to do so, then the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent. per mensem. Both courts have found that as a matter of fact the mortgagee had to pay and did pay the Government revenue. The question which we have to consider in the present appeal is what sum the plaintiff should pay as a condition precedent to obtaining possession of the property. It may be taken as a fact that the property is not really worth Rs. 8,000. It is contended on behalf of the plaintiff that, having regard to the terms of the mortgage and also having regard to the fact that the mortgage was executed before the Transfer of Property Act came into operation, the mortgagee was not entitled to the benefit of section 72, which entitles a mortgagee in possession to pay money in order to save the mortgage property and to add it to its principal. On the other hand, it is contended that the principle underlying the provisions of section 72 of the Transfer of Property Act, is not new, that the same principle of equity existed before. There seems to us considerable force in this latter contention. In any event the mortgagor may well

1916

BHOJ RAJ v. RAM NARAIN

have considered that his property was really liable for the Government revenue which had been paid by the mortgagee and that therefore he could not redeem the property without paying that amount together with Rs 3,000 the original advance. If therefore we assume the genuineness of the earlier mortgage and the *bona fides* of the parties, it seems to us that the plaintiff, in order to entitle him to be substituted for the vendee, must do what the vendor had agreed to do *viz.*, to discharge the claims that were made by the vendee and in consideration of which he transferred the equity of redemption. It is argued, however, that the mortgage in 1873 was really a sale and that the agreement by the mortgagor to pay Government revenue was fictitious. This argument is based upon the alleged fact that the property was never worth even the 3,000 rupees. The answer to this contention is that if the transaction of 1873 was really a sale, the suit ought to have been to pre-empt that, not the sale which took place in 1911. Such a suit is long barred by time. If the transaction was a fraud it can hardly be said that the pre-emptor did not know of it, because the presumption that it is a fraud is based upon the fact that the property was not worth anything like the three thousand advanced. In our opinion the consideration must be Rs. 3,000 together with the Government revenue which have been found to have been paid by the mortgagee, but in calculating this amount interest will only be allowed at annas ten per cent. per mensem on the Government revenue so paid. We modify the decree of the court below accordingly. The interest will be calculated by the office on the amount paid for the Government revenue, that is to say, each time the mortgagee paid the Government revenue, he will be entitled to get annas ten per cent per mensem upon each payment simple interest. We extend the time to six months from this date. If the plaintiff does not pay the amount ascertained within the time aforesaid, the suit will stand dismissed in all courts. The appellant must have his costs of this appeal.

Decree modified.

Before Mr. Justice Piggott and Mr. Justice Lindsay.

BHAWAN AND ANOTHER (DEFENDANTS) v. MADAN MOHAN LAL (PLAINTIFF)* 1916 *May*, 31.

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 202—*Remand*—*Effect of Revenue Court decision on the question of tenancy in a former suit, in a subsequent suit in Civil Court for ejectment as trespasser.*

Defendants were tenants of one *D*. *D* took proceedings in the Revenue courts to eject them as tenants-at-will The Assistant Collector dismissed the suit, but the Commissioner allowed the appeal. The Board of Revenue, however, in second appeal dismissed the suit *D* on the meantime had executed the decree passed by the Commissioner and obtained possession. Upon the decree passed by the Board of Revenue in their favour the defendants made an application to be restored to possession, but it was rejected as time-barred. *D*'s son brought the present suit to eject the defendants as trespassers alleging that he had been in possession of the land as his *kaud-kasht*; that the defendants had entered into forcible possession, and that the effect of the Revenue Court proceedings was to extinguish the tenancy The defendants pleaded that the tenancy subsisted The court of first instance decided that the tenancy was subsisting but granted to the plaintiff damages for forcible dispossession. The lower appellate court remanded the case to the first court with directions to act in accordance with the provisions of section 202 of the Agra Tenancy Act. *Held* that the order was the proper one to make in the circumstances of the case, and the question whether by reason of the events that had happened since the decision of the Board of Revenue the tenancy was extinguished or not was one which the Revenue courts were competent to decide. *Maru* v. *Gauri Sahai* (1) and *Surju Misir* v. *Bindesri Parshad* (2) referred to

THE appellants in this appeal were at one time tenants of Din Dayal. He sued to eject them, and the suit was dismissed by the Assistant Collector on the ground that they had acquired a right of occupancy. This decree was reversed by the Commissioner but restored by the Board of Revenue. In the meantime, however, the zamindar had taken out execution of the Commissioner's decree and formally ejected the appellants. After the decision of the Board of Revenue in their favour they applied for restoration of possession, but the application was dismissed as being time-barred. They, however, took actual possession of the land. Thereupon the heir of Din Dayal brought a suit against them in the Civil Court for ejectment as trespassers and for damages for forcible possession. His case was that the net result of the proceedings in the Revenue Court had been to extinguish the tenancy. The Munsif came to the

* First Appeal No. 35 of 1913, from an order of Hirdhar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 23rd of December, 1915.

(1) Weekly Notes, 1904, p. 45. (2) (1913) 11 A. L. J., 691.

1916

BHAWAN v. MADAN MOHAN LAL.

conclusion that, in view of the decision of the Board of Revenue and of the fact that the defendants had regained possession of the land, a subsisting tenancy was established. He dismissed the claim for ejectment but decreed damages for forcible recovery of possession. On appeal the Surbordinate Judge held that having regard to the pleadings of the parties the Munsif should have adopted the procedure laid down by section 202, clause (1), of the Agra Tenancy Act, and remanded the suit for compliance with the provisions of that section. The defendants appealed to the High Court against this order of remand.

Munshi *Lakshmi Narain*, for the appellants:—

All the issues arising in the case having been decided by the court of first instance the order remanding the suit is unjustifiable. The suit was not decided upon a preliminary point. Upon the view of the law taken by the lower appellate court the proper procedure would have been for that court itself to have passed the order required by section 202 of the Tenancy Act; *Jagan Nath* v. *Bhawani* (1). Secondly, section 202 of the Tenancy Act is intended to operate only in cases in which the question whether the defendant is or is not a tenant of the plaintiff has not already been finally determined between the parties by a competent Revenue Court. Where the highest Revenue tribunal has already decided that question between the parties that decision operates as *res judicata*, and it would be quite unnecessary, and would lead to an abuse of the process of the court, for a Civil Court to take action under section 202 in such a case; *Sarju Misir* v. *Bindesri Pershad* (2). The decision of the Board of Revenue is binding on the parties as *res judicata* unless the plaintiff is able to show that circumstances have so changed as to extinguish the occupancy tenancy declared by that decision to exist The Civil Court is entitled to examine the facts of the case in order to determine whether anything has supervened which renders the Revenue Court decision *res judicata* no longer. On the admitted facts of the case it is clear that according to the provisions of section 13,

(1) (1904) I. L. R., 27 All., 167.
(2) (1913) 11 A. L. J., 691.

clause (*a*), of the Tenancy Act, the appellants' occupancy rights still subsist.

Munshi *Gulzari Lal* (with him Munshi *Baleshwari Prasad*), for the respondent was not called upon.

PIGGOTT and LINDSAY, JJ :—This is an appeal by the defendants against an order of remand. The appellants were at one time in possession of a certain plot of land as tenants of one Din Dayal. Din Dayal took proceedings in the Revenue Court to eject them, on the ground that they were tenants at will. The court of first instance, i.e., the court of the Assistant Collector, dismissed Din Dayal's suit for ejectment. It was decreed on appeal by the Commissioner, and again dismissed on second appeal by the Board of Revenue. In the meantime however, the zamindar had taken out execution of the Commissioner's decree and had obtained formal possession. After the decision of the Board of Revenue in their favour, the tenants came to the Revenue court and asked to be restored to possession. It was held that this application, having been made after the prescribed period of limitation, was not maintainable and it was dismissed accordingly. The present plaintiff is the son of Din Dayal. He has brought this suit in the Civil Court on the allegation that the practical effect of the proceedings in the Revenue Court, and more particularly of the failure of the tenants to obtain within the prescribed period of limitation the benefit of the Board of Revenue's decision in their favour, had been to extinguish the tenancy. He alleges that he was himself in actual possession of the land in suit, cultivating the same as his *khud-kasht*, when the defendants re-entered into forcible possession thereof. He seeks for their ejectment as trespassers. The defendants' reply was to the effect that their tenancy was still subsisting and had not been extinguished by any of the facts relied upon by the plaintiff. The learned Munsif framed a number of issues and came to a decision in favour of the defendants on the question of their being still in possession under a subsisting tenancy. He also found in favour of the plaintiff on a subsidiary question, as to the latter's being entitled to damages on account of forcible possession taken by the defendants. Both parties appealed against this decree. The lower appellate

1916

BHAWAN v. MADAN MOHAN LAL.

court has pointed out that the provisions of section 202 of the Agra Tenancy Act (Local Act; II of 1901) had been overlooked by the court of first instance. When the defendants met the plaintiff's suit by a plea of the existence of a still subsisting tenancy, the position described by section 202 aforesaid arose, and the provisions of that section ought to have been complied with. In this view the learned Subordinate Judge has set aside the decree of the court of first instance and has remanded the case to that court, with directions to begin the trial all over again at the point where that court went wrong; i.e., the court of first instance has been directed to pass an order in compliance with the provisions of section 202 of the Tenancy Act and to suspend all further proceedings until the legal consequences of that order have taken effect. In appeal against this order of remand a formal objection is taken that the order in question is not one which should have been passed, but that the lower appellate court ought, in any view of the case, to have passed an order itself under the provisions of section 202 aforesaid. It appears that there are conflicting decisions of this Court on the point; but we are content to refer to the case of *Maru* v. *Gauri Sahai* (1) which commends itself to our minds. We think it obviously more convenient that the case should be sent back to the court of first instance to be proceeded with by that court from the point at which that court had gone wrong. In the second place the decision of the lower appellate court is assailed on the merits. We have been referred to the reported case of *Surju Misir* v. *Bindesri Pershad* (2). It is contended that the question of the existence of a tenancy, and of the rights of the present appellants as occupancy tenants of the land in suit, have been determined once for all by the decision of the Board of Revenue, that this decision should have been accepted, and that there was no room for any order under section 202 of the Tenancy Act. On the facts of the present case we do not think that the ruling above referred to is applicable. The decision of the Board of Revenue determines this point, viz., that, on the date on which the present plaintiff's father sought the ejectment of the defendants as tenants-at-will, the said defendants were in fact in possession of the land in suit as occupancy tenants.

(1) Weekly Notes, 1904, p. 46. (2) (1913) 11 A. L. J., 691.

1916

BHAWAN v. MADAN MOHAN LAL.

That point is *res judicata* between the parties, having been determined by the ultimate court of competent jurisdiction. The plaintiff's case is that events have taken place since then which have put an end to the tenancy, and that the defendants have re-entered into possession of the land in suit as trespassers pure and simple. It has to be determined, on the one hand, what is the legal effect of the failure of the defendants to obtain within the prescribed period of limitation the benefit of the Board of Revenue's decision in their favour; and, on the other hand, the provisions of section 13 of the Tenancy Act, and their application to the facts of the present case, require to be considered. These, however, are points reserved by the Legislature for the decision of the Revenue Courts. The question must go to those courts for determination, whether the events which have occurred since the original suit for ejectment was instituted have or have not extinguished the tenancy which the Board of Revenue found to exist. We are satisfied that the order of the lower appellate court was right and the direction given by it correct. We therefore dismiss this appeal. Under the circumstances we order that costs of this appeal be costs in the cause.

Appeal dismissed.

Before Mr. Justice Piggott and Mr Justice Lindsay

1916
May, 31.

SANTI LAL (JUDGEMENT-DEBTOR) *v.* THE INDIAN EXCHANGE BANK, (DECREE-HOLDER) *

Act No. VI of 1882 (*Indian Companies Act*), *section* 169—*Civil Procedure Code*, 1908, *order XXI, rules* 58 *and* 63—*Appeal*

The right of appeal under the provisions of section 169 of Act No VI of 1882, is co-extensive with the right of appeal conferred by the Code of Civil Procedure

In the liquidation proceeding of the Indian Exchange Bank a certain person described as the proprietor of the firm was directed by the Additional Judge of Lahore to pay a certain sum as contributory. This order was sent to the District Judge of Agra for execution, when another person put in an objection to the effect that he was the sole proprietor of the firm. The District Judge declined to consider this objection.

Held, that no appeal lay from the Judge's order, inasmuch as it was under order XXI, rule 58, the objection being under order XXI, rule 58.

* First Appeal No. 38 of 1916, from an order of D R. Lyle, District Judge of Agra, dated the 8th of January, 1916.

1916

SANTI LAL v. THE INDIAN EXCHANGE BANK.

THE facts of this case were as follows :—

Liquidation proceedings in the matter of the Indian Exchange Bank were pending in the Court of the Additional Judge of Lahore under the old Companies Act (Act VI of 1882). The Additional Judge of Lahore passed an order directing one Lachmi Narain as a contributor to pay a sum of Rs. 2,475 towards the funds of the Bank in liquidation. This order was sent down to be executed in the court of the District Judge of Agra. In the liquidation proceedings, and in the order which was issued from the court at Lahore, Lachmi Narain was described as being the proprietor of a firm styled Nand Lal Santi Lal. Certain goods were attached by the District Judge of Agra in execution of the order received by him and on this having been done the present appellant Santi Lal filed an objection, in which he stated that he and not Lachmi Narain was the sole proprietor of the firm in question. The learned District Judge was of opinion that he had no power to entertain a petition of this kind. The order was issued from the Lahore court with an express statement that Lachmi Narain was proprietor of the firm. The Judge therefore refrained from inquiry as to whether Santi Lal was or was not the proprietor of the firm.

Santi Lal appealed to the High Court from the order of the District Judge declining to inquire into his rights. A preliminary objection was taken by the respondent firm that no appeal lay from the Judge's order. The objection prevailed.

Munshi *Damodar Das*, for the appellant.

Babu *Girdhari Lal Agarwala* and The Hon'ble Munshi *Narayan Prasad Ashthana*, for the respondent.

PIGGOTT and LINDSAY, JJ.:—This is a first appeal against an order of the District Judge of Agra passed under the following circumstances. It appears that liquidation proceedings in the matter of the Indian Exchange Bank were pending in the court of the Additional Judge of Lahore under the old Companies Act (Act VI of 1882). The Additional Judge of Lahore passed an order directing one Lachmi Narain as a contributory to pay a sum of Rs. 2,475 towards the funds of the Bank in liquidation. This order was sent down to be executed in the court of the District Judge of Agra. In the liquidation proceedings and in the order which

was issued from the court at Lahore, Lachmi Narain was described as being the proprietor of a firm styled Nand Lal Santi Lal Certain goods were attached by the District Judge of Agra in execution of the order received by him, and on this having been done the present appellant Santi Lal filed an objection in which he stated that he and not Lachmi Narain was the sole proprietor of the firm in question. The learned District Judge was of opinion that he had no power to entertain a petition of this kind. The order was issued from the Lahore court with an express statement that Lachmi Narain was proprietor of the firm The Judge therefore refrained from inquiry as to whether Santi Lal was or was not the proprietor of the firm.

We may note here that the petition of objection which was filed by Santi Lal purported to be under order XXI, rule 58, of the Code of Civil Procedure, and that being so the order passed by the learned District Judge must be taken to be an order under order XXI, rule 63. A preliminary objection has been raised that no appeal lies, and we think that the objection must prevail. If the order of the Agra Court is treated as having been made under rule 63 of order XXI the matter is clear enough.

The only remedy of a person whose objection has been dismissed is by bringing a suit for a declaration. Moreover, it is clear that an order of this kind is not appealable under order XLIII of the Code of Civil Procedure. The learned vakil for the appellant has drawn our attention to the provisions of sections 166, 167 and 169 of the Companies Act, VI of 1882. He relies upon the provisions of section 169, for the purpose of showing that an appeal lies in the present case. But we are unable to entertain this argument. It appears to us that section 169 of the Companies Act (Act VI of 1882), merely provides for a right of appeal in the case of orders which would have been appealable had they been passed by the court in the exercise of its ordinary jurisdiction This brings us back again to the provisions of the Code of Civil Procedure, which regulates cases in which appeals from orders in Civil Courts lie. It appears to us quite clear therefore that the right of appeal under the provisions of section 169 of the old Companies Act, is co-extensive with the right of appeal conferred by the Code

1916

SANTI LAL v. THE INDIAN EXCHANGE BANK.

of Civil Procedure; and, as we have already mentioned, an appeal in a case of this sort would not lie under the Code. We are satisfied that the preliminary objection is sound and must prevail. We dismiss the appeal with costs.

Appeal dismissed.

1916
June, 1.

Before Mr. Justice Piggott and Mr. Justice Lindsay

KHIALI RAM (DEFENDANT) v. TAIK RAM AND OTHERS (PLAINTIFFS) AND PARSOTAM AND ANOTHER (DEFENDANTS) *

—Redemption—Burden of proof—One mortgagor redeeming the entire mortgage—Acknowledgement—Dakhalnama—Act IX of 1908 (Indian Limitation Act), section 19, schedule I, article 148.

In a suit by the representatives of some of the co-mortgagors for the redemption of their shares in certain property against the representatives of a co-mortgagor, who had redeemed the mortgage, the plaintiffs alleged that the mortgage had been made by one Sukhjit in favour of one Muhammad Husain in the year 1913 Sambat. The plaintiffs also relied on certain acknowledgements made by the defendant's predecessor in title One of these was a *dakhalnama* executed by Ram Lal in 1890 which contained a description of the property and was signed by Ram Lal. The defendant contended that there was no mortgage, that he was absolute owner, that the acknowledgements had not been proved, and that the suit was time-barred. It was held by the lower appellate court that the date of the mortgage had not been proved, but the acknowledgements were in respect of some mortgage and that the plaintiffs were entitled to redeem.

Held that the rule of limitation governing a suit of this kind was that laid down in *Ashfaq Ahmad* v. *Wasir Ali*, (1) viz that article 148 of Schedule I to the Limitation Act applied, that is, the limitation extended for a period of 60 years from the date of execution of the mortgage or from the date when the mortgage money became due, and the burden was upon the plaintiffs of proving the mortgage that they had set up, and that it was for them to prove that the acknowledgement relied upon by them as contained in the *dakhalnama* had been made at a date within the period of limitation.

Held further, that the acknowledgement contained in the *dakhalnama* amounted to nothing more than a description of the property purchased and was not an acknowledgement of liability within the meaning of section 19 of the Limitation Act *Dharma Vithal* v. *Govind Sadvalkar* (2) referred to.

THE plaintiffs alleged that their ancestor Sukhjit had executed a usufructuary mortage for Rs. 200 in Sambat 1913, corresponding to 1856 A. D.; that Manik, one of the five sons of Sukjit, redeemed the whole mortgage in 1871 or thereabouts, becoming

* First Appeal No. 12 of 1916, from an order of Abdul Ali, Subordinate Judge of Agra, dated the 10th of December, 1915.

(1) (1889) I. L. R., 11 All., 493. (2) (1883) I. L. R., 8 Bom., 99.

thereby the owner of $\frac{1}{4}$th of the property and mortgagee of $\frac{1}{4}$ths, that Manik's rights passed to one Ram Lal in 1890 by purchase at the auction sale held in execution of a decree; that the defendants were the heirs of Ram Lal and thus owned and possessed the mortgagee rights over $\frac{1}{4}$ths of the property. The plaintiffs sought redemption of the $\frac{1}{4}$ths share on payment of Rs. 160. In their plaint the plaintiffs set out full details of the mortgage of Sambat 1913 which they sought to redeem; they also set forth various acknowledgements of the existence of the mortgage, said to have been made from time to time by the original mortgagees or their successor in interest, including a *dakhalnama* executed by Ram Lal after his auction purchase in 1890. The defendants denied the existence of the mortgage, pleaded that they were in possession as owners, and also pleaded that the plaintiffs' right of redemption, supposing there had been a mortgage, was barred by limitation. The court of first instance held that the plaintiffs had failed to prove the specific mortgage set up by them, that a mortgage must have been executed sometime prior to Sambat 1913; but that the suit was barred by limitation, as the plaintiffs had failed to prove that any of the acknowledgements relied upon by them had been made within time. The lower appellate court also found that the mortgage of Sambat 1913 was not proved; but it held that, having regard to the numerous acknowledgements, and entries in the village papers, it lay upon the defendants to show that these were made beyond time and that the plaintiffs had no subsisting title. The suit was remanded for trial of the remaining issues. The defendants appealed against the order of remand.

The Hon'ble Munshi *Narayan Prasad Asthana*, for the appellants:—

The plaintiffs having failed to prove the specific mortgage upon which they came to court, the suit should be dismissed; *Sheo Prasad* v. *Lalit Kuar* (1). The plaintiffs relied upon the entries and alleged admissions, not as saving limitation but as proving the mortgage; for, according to them, the suit was within time independently of any acknowledgement. But entries in revenue papers or admissions made at some previous

(1) (1896) I. L. R., 18 All., 403.

1916

KHALI RAM v. TAIK RAM

date, of the existence of an indefinite mortgage cannot prove the specific mortgage sued on; nor do they prove that any mortgage is subsisting now. It is for the plaintiff in a suit for redemption to prove a subsisting title and an entry in a Revenue paper or an admission, showing no more than that at some by-gone time there existed some mortgage between the parties or their predecessors, does not shift the burden on to the defendants of proving that no mortgage subsists at the present moment. *Frank Hay* v. *Rafiuddin* (1), *Ram Lal* v. *Sri Thakurji Kishori Ramanji Maharaj* (2). The case of *Dip Singh* v. *Girand Singh* (3) is distinguishable and does not apply to the circumstances of the present case. With the exception of the *dakhalnama* of 1890, papers relied upon by the plaintiffs do not bear the signatures of the defendants or of any of their predecessors in interest; these latter, therefore, cannot operate as acknowledgements under section 19 of the Limitation Act. The specification, given in the *dakhalnama*, of the property sold and setting forth that $\frac{1}{8}$th share was in possession of Manik as mortgagee of his brothers is merely descriptive and not a distinct acknowledgement of an existing liability. It does not amount to an admission in writing of an existing jural relation: for that purpose the consciousness and intention of the person making the admission must be clear. It cannot serve as an acknowledgement under section 19 of the Limitation Act; *Dharma Vithal* v. *Govind Sadvalkar* (4). Supposing the *dakhalnama* be held to be a valid acknowledgement, the plaintiffs have failed to prove that it was made within 60 years of the date of the mortgage.

Pandit *Kailash Nath Katju*, (for Pandit *Shiam Krishna Dar*), for the respondents:—

The plaintiffs did not tie themselves down to a mortgage of date Sambat 1913: they would be entitled to a decree if it were shown that the land was still held by the defendants as mortgagees and that the plaintiffs had a subsisting title to redeem. *Bala* v. *Shiva* (5) *Lalla Dalbee Pershad* v. *Beharee Lall* (6).

(1) (1914) 12 A. L. J., 769.
(2) (1913) 12 A. L. J., 102.
(3) (1903) I. L. R., 26 All., 313.
(4) (1883) I. L. R., 8 Bom., 99.
(5) (1901) I. L. R., 27 Bom., 271.
(6) N.-W. P., H. C. Rep., 1863, 88.

Admittedly, at one time, there was a mortgage between the predecessors in interest of the parties. The finding is that the mortgage was executed sometime prior to 1856; neither party has proved the exact date. There are a number of admissions by the predecessors in interest of the defendants showing the existence of a mortgage, and consisting of entries in revenue papers and in the *dakhalnama* of 1890. Having regard to this series of admissions showing that ever since 1862 the property has been mentioned and described as mortgaged property and sold as such, the *onus* was upon the defendants of proving that the mortgage had ceased to subsist. No doubt, ordinarily it is for the plaintiff in a redemption suit to prove a subsisting title; but under the circumstances of the case the *onus* was shifted on to the defendants of satisfying the court that the mortgage was executed more than 60 years prior to the dates of the admissions. The acknowledgements must be treated as admissions of a subsisting mortgage, and it would be for the defendants to explain them away if they could. To be effective under section 19 of the Limitation Act the acknowledgements need not contain the details or particulars of the mortgage, *Dip Singh* v. *Girand Singh* (1), *Ram Singh* v. *Baldeo Singh* (2), *Daia Chand* v. *Sarfraz* (3), *Uppi Haji* v. *Mammavan* (4). It is objected that the entries in the revenue papers cannot operate as acknowledgements, as it has not been proved that those papers were signed by the original mortgagees or their successors. As to the wajib-ul-arz of 1862 it must be presumed that it was signed by all the co-sharers. At all events the *dakhalnama* is signed by Ram Lal. It is not merely descriptive, but it must be taken as showing that Ram Lal knew that he was purchasing only the mortgagee rights in respect of ⅜ths of the property. It is therefore a conscious admission of the existence of the mortgage, and of the legal result flowing therefrom, namely, his liability to be redeemed. *Maniram Seth* v. *Seth Rupchand* (5), *Bala* v. *Shiva* (6).

(1) (1903) I. L. R., 26 All., 313.
(2) Weekly Notes, 1895, p. 300
( ) (1875) I. L. R., 1 All., 117.
(4) (1894) I. L. R., 16 Mad., 366.
(5) (1906) I. L. R., 33 Calc., 1047.
(6) (1902) I. L. R., 27 Bom., 271.

1916

KHIALI RAM v. TAIK RAM.

Apart from these acknowledgements there is another ground upon which the suit is within limitation When Manik redeemed the whole mortgage in 1871 he acquired a charge, under the provisions of section 95 of the Transfer of Property Act, in respect of the share of his co-mortgagors. The original mortgage vanished and in its place the charge in favour of Manik came into existence. This view is supported by the cases of *Bhagwan Das* v. *Har Dei* (1) and *Sagar Mal* v *Janki Das* (2) The limitation applicable to a suit like the present, namely, for redemption of the charge in the hands of the redeeming co-mortgagor or his transferee, is that prescribed by article 144, namely, 12 years from the date when the possession of the defendant becomes adverse; and it is for the defendant to prove that his posession became adverse from such a date; *Vithal Moreshwar Desai* v. *Dinkarrao Ramchandrarao* (3), *Mordin* v. *Oothumangarni* (4), *Jai Kishan Joshi* v. *Budhanand Joshi* (5). In the present case it is admitted that Ram Lal purchased mortgagee rights. He never set up an adverse title The view taken in the case of *Ashfaq Ahmad* v. *Wazir Ali* (6) was that the limitation for a suit like the present was 60 years, under article 148, from the date of the original mortgage. It was based on the view that the redeeming co-mortgagor steps into the shoes of the mortgagee and he can exercise all the rights and is subject to all the liabilities of the original mortgagee. But this view has not been accepted in later cases, already cited; for it has been held that article 132 applies to a suit by him to enforce his rights, whereas according to I. L. R., 11 All, 428, his suit should come under article 148. When, therefore, one branch of the law laid down in the above case does not hold good, the other branch, too, must go with it.

The Hon'ble Munshi *Narayan Prasad Ashthana*, was not called upon to reply.

PIGGOTT and LINDSAY, JJ.:—This is a defendant's appeal against an order passed by the Subordinate Judge of Agra in the exercise of his appellate powers. He has directed that

(1) (1903) I. L. R., 26 All., 227.
(2) (1904) 1 A. L. J., 276.
(3) (1901) 3 Bom. L. R., 685.
(4) (1883) I. L. R., 11 Mad., 416.
(5) (1916) I. L. R., 38 All, 138.
(6) (1888) I. L. R., 11 All., 425.

a suit which had been pending in the court of the Munsif of Agra, and in which an appeal had been preferred to his court, should be sent back to the court of first instance for determination of the remaining issues. The suit which was before the Munsif was a suit for redemption brought by Taik Ram and others, who alleged themselves to be the descendants of one Sukhjit. In the third paragraph of the plaint the plaintiffs gave particulars of the mortgage under which they claimed to have a right of redemption. It is stated in that paragraph of the plaint that the mortgage had been made in the Sambat year 1913; that the name of the mortgagor was Sukhjit; that the mortgage had been executed in favour of Muhammad Husain Khan; that the total amount of the mortgage-debt was Rs. 200, and that the mortgage was with possession, the agreement being that profits should be taken by the mortgagee in lieu of interest. In addition to these particulars the plaintiffs gave details of the mortgaged property consisting of various plots of land, the total area being 10 bighas, 9 biswas. It was further alleged in the plaint that after the death of the mortgagor Sukhjit, *i. e.*, in or about the year 1871 this mortgage was redeemed by one Manik who was one of the five sons of Sukhjit, the mortgagor. The defendants in the present case, it is said, are the mortgagees in possession of the property described in the plaint. They have acquired title through one Ram Lal, who, it is said, in the year 1890, in execution of a decree obtained against Daya Ram, one of the brothers of Manik, the man just mentioned, purchased this property. The case for the plaintiffs, therefore, was that these defendants were in possession as mortgagees and that they were liable to submit to redemption. In the fifth paragraph of the plaint there was a statement made to the effect that at various times the mortgagees had admitted the existence of the mortgage executed in favour of Muhammad Husain, and in particular, a reference was made to an admission or acknowledgement contained in a document described as a *dakhalnama* which was written in the year 1890. This document was referred to by the plaintiffs with the object of showing that their suit was within limitation. The defendants traversed the various pleas set out in the plaint and in the first paragraph of the additional pleas contained in the written

1916

KHIALI RAM v. TAIK RAM.

statement it was asserted that the mortgage upon which the plaintiffs relied had never existed The defendants claimed that they were in adverse and proprietary possession of the property in suit. Various other pleas were taken, including one of limitation; and on the pleadings put forward by the parties six issues were raised in the court of first instance The Munsif came to the conclusion that the plaintiffs had failed to prove the specific mortgage which they set out in the plaint, and, being of opinion that they had not succeeded in making out any subsisting title, he dismissed the suit With reference to the various admissions or acknowledgements referred to in paragraph 5 of the plaint, the Munsif held that the plaintiffs had failed to show that any acknowledgement made by the mortgagee had been made while limitation was still running. The case came up in appeal before the Subordinate Judge, and he begins his judgement by saying that the only question before him for determination was one of limitation The learned Subordinate Judge agreed with the first court that the oral evidence which had been adduced by the plaintiffs in order to prove the execution of the mortgage in the year 1913 Sambat was altogether worthless As regards the acknowledgements, however, he took a different view from the court of first instance He refers to the various statements which were relied upon by the plaintiffs as acknowledgements and held that in the circumstances it lay upon the defendants to show that these acknowledgements had been made at a time beyond the period of limitation fixed for a suit for redemption Being of opinion therefore that the plaintiffs had still a subsisting title on the strength of which they were justified in asking for a decree for redemption, he sent the case back to the court of first instance to dispose of the other issues in the case. The defendants now come in appeal in this Court, and five grounds are taken in the memorandum of appeal. The first of these is that the lower appellate court, having found that the plaintiffs had failed to prove the particular mortgage set up by them, ought to have dismissed the suit. The second ground relates to the acknowledgements. It is contended that mere acknowledgements do not by themselves prove the specific mortgage that was set up in the plaint, or that the particular mortgage upon which the plaintiffs

relied was still subsisting. In the third ground it is complained that the lower appellate court wrongly threw upon the defendants the burden of proving that the suit was time barred In the fourth ground exception was taken to the manner in which the lower appellate court dealt with one particular acknowledgement, viz., that which is contained in the *dakhalnama* of the year 1890 The last ground is that the plaintiffs ought to have proved that there was a subsisting mortgage and that any of the acknowledgements upon which they relied was made within 60 years of the date of the original mortgage The suit being one for recovery of possession of land by redemption there can be no doubt that it lay upon the plaintiffs to show that at the time the suit was brought they had in themselves a title on the strength of which they could ask the court to give them a decree for possession, and the question which we have to decide is whether or not the plaintiffs have discharged their burden. In this connection the first point to be considered is the question of limitation. What is the rule of limitation governing a suit of the present description ? It will be remembered that the suit as framed is really a suit brought by the representatives of some co-mortgagors against the legal representatives of a co-mortgagor who redeemed the entire mortgage. So far as the law of limitation is concerned we must take it that it is settled for a case of this kind by the Full Bench ruling which is reported in *Ashfaq Ahmad* v. *Wazir Ali* (1) It is true that this judgement has in subsequent decisions of this Court been criticized with reference to the view there taken regarding the status of one of several co-mortgagors who redeems the entire mortgage ; but, as far as we are aware, the rule of limitation which is laid down in this judgement has never been decided to be erroneous, and we must take it therefore that the article which applies to this suit is article 148 of the first schedule of the Limitation Act, *i. e.*, that limitation extends for a period of 60 years from the date of execution of the mortgage or from the date when the mortgage money becomes due. It must be taken on the findings of the court below that the plaintiffs have failed to prove that a mortgage was made by Sukhjit in favour of Muhammad Husain Khan

(1) (1889) I L.R. 11 All., 423.

1916

KHIALI RAM v. TAIK RAM

in the year 1913 Sambat. No document was produced before the court of first instance and the plaintiffs put forward secondary evidence which has been discredited by both courts. [Some evidence was here referred to.] We have no doubt therefore that the Munsif was quite right when he said that the mortgage which had been executed in favour of Muhammad Husain must have been executed sometime previous to the year 1913 Sambat. We have it settled then that the plaintiffs were unable to establish the execution of the mortgage which was set out in all its details in paragraph 3 of the plaint.

We now have to consider the acknowledgements or the admissions on which the plaintiffs relied in this case. The position is somewhat curious, because obviously the plaintiffs were not relying upon these acknowledgements or admissions in order to show that the suit was within time. Clearly they were unable to show that the mortgage had in fact been executed in favour of Muhammad Husain in the year 1913 Sambat, and it would have been superfluous for them to rely upon any acknowledgement for a suit based upon the mortgage of 1913 Sambat, it being within limitation on the date on which the present suit was filed. However, we proceed to consider the so-called acknowledgements upon which the plaintiffs rely for the purpose of showing that they have still a subsisting right to redeem. [Four documents, namely (1) Wajib-ul-arz of 1862, (2) Khewat of 1862, (3) Certified copy of the fly-sheet of the record of a mutation case and (4) Khewat of 1876-77 were here referred to and it was pointed out that none of them was signed by the parties against whom the property was claimed or by any one from whom they derived title]. We come now to the last document upon which the plaintiffs relied, and in fact it is the only document upon which they could rely for the purpose of proving an acknowledgement under section 19 of the Limitation Act. It is proved that in the year 1890 Ram Lal, who is the father of the first defendant in the case, obtained a decree against Daya Ram, and in execution of that decree purchased certain immovable property which was in Daya Ram's possession. Having purchased it he got formal possession delivered to him by an officer of the court, and the *dakhalnama*, dated the 28th of September, 1890, is the receipt given by Ram Lal to the court's

1916

KHIALI RAM v. TAIK RAM.

officer on the date upon which he delivered possession of the land. There seems to be no doubt that this document was signed by Ram Lal At the bottom of this document there is a description of the property which Ram Lal had acquired at the auction sale It is described in the following words :—" 10 bighas and 9 biswas belonged to Manik absolutely while four shares were in possession of Manik as mortgagee of his brothers, Daya Ram, Bhim Sen, Pirthi and Nawal Kishore " It has been argued by the learned vakil who appears to support the appeal that the learned Subordinate Judge was wrong in treating this document as an acknowledgement for the purpose of section 12 of the Limitation Act. Before proceeding to discuss the point, we may observe that the court must be taken to have fallen into error in taking notice of the other documents in which it is said certain acknowledgements were contained. The learned Subordinate Judge failed to notice that it was necessary for the plaintiffs to show that any document purporting to contain an acknowledgement must bear the signature of all the persons against whom the claim is being made. To return to the *dakhalnama*. We have carefully examined this document and we have come to the conclusion that it should not be treated as an acknowledgement for the purpose of section 19 of the Limitation Act. In this connection we refer to the decision of the Bombay High Court reported in *Dharma Vithal* v. *Govind Sadvalkar* (1). The facts of that case are in many respects similar to the facts of the case now before us. It appears from the report that the plaintiff's ancestor mortgaged some land to the defendant's ancestor in 1797 and placed him in possession. A few years after this mortgage was executed both the mortgagor and mortgagee went out of the country. The mortgagor returned first and resumed possession of the land. When the mortgagee came back he found it necessary to file a suit against the mortgagor for the purpose of recovery of possession. The suit was brought in the year 1826. In execution of the decree possession of the property was delivered to the mortgagee and a formal receipt was given by him to the court officer acknowledging that possession had been received In the year 1880 the representative of the original

(1) (1858) I. L. R., 8 Bom., 99.

1916

KHIALI RAM v. TAIK RAM.

mortgagor brought a suit for redemption, and, for the purpose of showing that the claim was within time, he relied upon the receipt which was given in the year 1827 by the mortgagee after he had obtained possession. The lower appellate court had held that because this formal receipt contained a reference to the decree in execution of which possession of the land was delivered it was evidence of the acknowledgement by the mortgagee that there was a mortgage subsisting in the year 1827. Accordingly it was of opinion that any suit for redemption filed before 1887 would be within time. The learned Judges of the Bombay High Court held that the interpretation which the lower appellate court had put upon this document was erroneous. Referring to the language of section 19 of Act XV of 1877, they pointed out that the section intends a distinct acknowledgement of an existing liability to serve as a re-creation of it at the time of such acknowledgement, but that there cannot really be an acknowledgement without knowledge that the party is admitting something. They went on to observe that all that the receipt admitted by implication was that certain land had been awarded to the mortgagee and had passed into his possession. In the latter part of the judgement they proceeded as follows, (see page 102 of the report) :—"The intention of the law is manifestly to make an admission in writing of an existing jural relation of the kind specified equivalent for the purposes of limitation to a new contract: but for this purpose the consciousness and intention must be as clear as they would be in a contract itself, and no one would pretend that a contract to buy land awarded by a particular decree was an admission of the particulars of the judgement. The reference would be merely a means of defining the thing bargained for, and here the reference was merely a means of defining the thing delivered." Applying this principle to the case now before us, we think that what is relied upon by the plaintiffs as an acknowledgement contained in the *dakhalnama* amounts to nothing more than a description of the property of which Ram Lal had got possession after he had purchased it at an auction sale. We are clearly of opinion that this document cannot be relied upon as an acknowledgement of liability within the meaning of section 19 of the Limitation Act. Even if we are to assume that the document could be regarded in this

light we should be unable to follow the reasoning of the lower court with regard to the shifting of the burden of proof. We have already mentioned that the learned Judge held that the *dakhalnama* had been made beyond the period of limitation. He referred to the case of *Dip Singh* v. *Gurand Singh* (1), and on the authority of that case he held that it lay upon the defendants here to explain away this acknowledgement. The question of the burden of proof must be decided in every case according to its own facts, and it is not for us to say that the decision relied upon by the lower appellate court was in any way erroneous. We have to confine our attention to the facts which we have now before us and to ask ourselves in this particular case, should the burden of proof be laid upon the defendants? The principle is of course that the party who has special means of knowledge of a fact is under the obligation to take up the burden of proving that fact. But as the defendants in the present case are sons and grandsons of one Ram Lal, who, in the year 1890, acquired the property at an auction sale, it would, we think, be difficult for them to have any special knowledge or means of knowledge which is not equally within the power of the plaintiffs in the present case. The plaintiffs themselves had by the frame of their plaint taken up the position that they had accurate knowledge of particulars of the mortgage under which they claimed to have right of redemption; otherwise it would have been impossible for them to set out such details of fact as are mentioned in paragraph 3 of the plaint. We think, as regards the admission contained, or said to be contained, in the *dakhalnama*, it was for them to show that this acknowledgement had been made at some date within the period of limitation which would govern a suit for redemption based upon the mortgage upon which they relied. We have come to the conclusion, therefore, that the order of the lower appellate court cannot stand. For the reasons we have given we find that the plaintiffs came to court with a specific case, which they had failed to prove, and that they were unable to show that on the date the suit was brought they had any subsisting right to redeem. Their suit was, therefore, liable

1916

KHIALI RAM v. TAIK RAM

court below and restore the decree of the court of first instance. The appellants will have their costs both here and in the lower appellate court.

PRIVY COUNCIL.

*P. C.**
1916

June 5, 6, 7, *July*, 21.

MURTAZA HUSAIN KHAN (PLAINTIFF) v. MUHAMMAD YASIN ALI KHAN (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Act No. I *of* 1869 *(Oudh Estates Act), sections* 8, 10—*Sanad granted by Government and death of grantee before Act passed into law—Status and rights of grantee—Name of grantee entered in lists* 1 *and* 2 *after his death—Descent by primogeniture—Custom of descent of non-talukdari property acquired by talukdar, a Muhammadan—Burden of proof—Presumption of pre-existing custom—Wajib-ul-arz, value of.*

On the 17th of October, 1861, *J*, a Muhammadan and the ancestor of the parties to this appeal, received from the British Government a sanad conferring on him the full proprietary right, title and possession of the taluqa of Deogaon, with a condition that in the event "of you or any of your successors dying intestate, the estate shall descend to the nearest male heir, i.e., sons, nephews, etc., according to the rule of primogeniture." He died in 1865, but his name was entered in lists 1 and 2 of those prepared under section 8 of the Oudh Estates Act (I of 1869).

Held that *J* had acquired, as declared by section 3 of the Act, a "permanent, heritable and transferable right" in his estate, and was unquestionably a "talukdar" within the meaning of the Act. His death before the Act was passed into law made no difference in his status or in his rights.

The provision in section 8, that the lists should be prepared "within six months after the passing of the Act," was clearly meant as a limit for their completion, and not for their imitation.

Descent by primogeniture was not confined to cases coming under list 3. The provision in section 10 that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are talukdars" does not mean that they shall be conclusive merely as to the fact that the persons entered therein are talukdars as defined in section 2, but also that the courts shall regard the insertion of the names in those lists as "conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. *Achal Ram* v. *Udai Partab Addya Dat Singh* (1) and *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (2) discussed and explained. *J*'s name could therefore only have been included in list 2

Present:—Lord ATKINSON, Lord PARKER of WADDINGTON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1888) I. L. R., 10 Calc., 511; L.R., 11 I.A., 1.

(2) (1894) I. L. R., 10 Calc., 792; L.R., 11 I.A., 130.

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

by virtue of a pre-existing custom governing the devolution of the estate to a single heir; and section 10 made that entry conclusive evidence of that fact.

The present suit related to property acquired by the son of *J* who succeeded him, which, it was contended by the appellant (plaintiff), descended not by the custom of lineal primogeniture set up by the respondent (defendant) but in accordance with the ordinary Muhammadan law.

Held that the provision as to conclusiveness in section 10 is confined to estates "within the meaning of the Act," and does not apply to non-taluqdari property, but the existence of the pre-existing custom gives rise to a presumption in the case of a family governed by Muhammadan law, which makes no distinction between ancestral and self-acquired property, that if a custom governs the succession to the taluqa it attaches also to the personal acquisitions of the last owner left by him on his death, and it is for the person who asserts that these properties follow a line of devolution different from that of the taluqa to establish it. *Janki Prasad Singh* v. *Dwarka Prasad Singh* (1); *Maharajah Partab Narain Singh* v. *Maharanee Subhao Koer* (2) and *Parbati Kumari Debi* v. *Jogadis Chandar Dhabal* (3) distinguished as being cases governed by the Hindu law of the Mitakshara, which recognizes different courses of devolution for ancestral and self-acquired properties.

Wajib-ul-arzes which merely narrated traditions and purported to give the history of devolutions in certain families, not even of the narrator, were held to be not sufficient to rebut the presumption of a pre-existing custom.

APPEAL No. 37 of 1915 from a judgement and decree (4th August, 1913) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (25th April, 1913) of the Subordinate Judge of Sultanpur.

The facts were as follows :—

At the time of the second summary settlement of Oudh, one Jamshed Ali Khan, the ancestor of the parties to the appeal, was found to be in possession of 19 villages, which were collectively known as taluqa Deogaon, and on the 19th of December, 1858, a settlement of the taluqa was made with him on payment of a revenue of Rs. 4,068, the settlement being declared final by an order of Government, dated the 19th of October, 1859. In pursuance of a circular issued by the Chief Commissioner, dated the 18th of January, 1860, addressed to those taluqdars in whose families the law of primogeniture did not prevail, Jamshed Ali Khan on the 6th of February, 1860, made a return electing that the estate should in future be impartible; and in consequence of his election

(1) (1913) I. L. R., 35 All., 391; L.R., 40 I.A., 170.

(2) (1877) I. L. R., 3 Calc., 626, L.R., 4 I.A., 223.

(3) (1902) I. L. R., 29 Calc., 433; L.R., 29 I.A., 82

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN

a primogeniture sanad was granted to him on the 17th of October, 1861.

Jamshed Ali Khan died in 1865. In the lists prepared under section 8 of the Oudh Estates Act (I of 1869) his name, although he was then dead, was entered in list 1, and it was also entered in list 2 (according to the appellants' case erroneously so entered instead of in list 3). List 2 was "a list of the taluqdars whose estates, according to the custom of the family, on and before the 13th day of February, 1856, ordinarily devolved upon a single heir," and list 3 was "a list of the taluqdars, not included in list 2, to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture."

On the death of Jamshed Ali Khan, his son, Azam Ali Khan, succeeded to the taluqa. He carried on a money-lending business, and from the profits of his business acquired the properties in dispute in the present suit, which (according to the appellant's case) were entirely separate and distinct from the villages of which taluqa Deogaon consisted.

Azam Khan died in 1899 leaving two sons, Mustafa Ali Khan and Murtaza Husain Khan, the appellant. Mustafa Ali Khan died intestate in October, 1909, leaving Muhammad Yasin Ali Khan, the respondent, his sole heir and successor.

The suit out of which the present appeal arose was instituted on the 12th of April, 1910, by the appellant against the respondent to recover possession of a half share in the property of Azam Ali Khan other than taluqa Deogaon.

The defence was that Mustafa Ali Khan succeeded as heir to the taluqa to the exclusion of the appellant because the succession was governed by Act I of 1869, section 22; because the property in suit was an accretion to the taluqa, the succession to which was certainly governed by Act I of 1869; and because the succession to all the family property was governed by a family custom of lineal primogeniture.

The Subordinate Judge held that the property in suit was not an accretion to the taluqa; that as Jamshed Ali Khan died in

1865, the provisions of Act I of 1869 were not applicable even to the taluqa, and that the custom set up by the respondent was not established in the evidence. He accordingly made a decree in favour of the appellant for one half of the property in suit.

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

An appeal by the respondent was heard by the court of the Judicial Commissioner (Mr KANHAIYA LAL, First Additional Judicial Commissioner, and MR A SARONADIERE Second Additional Judicial Commissioner) which held that a custom of succession by a single heir was established in regard to the taluqa, and covered all property subsequently acquired by Azam Ali Khan. They differed from the Subordinate Judge as to the applicability of Act I of 1869, and raised a presumption in favour of the existence of the custom from the fact that the name of Jamshed Ali Khan had been entered in list 2. In accordance with these findings they reversed the decision of the Subordinate Judge and made a decree dismissing the suit. The judgements of the Court of the Judicial Commissioner will be found reported in 16 Oudh Cases, 290.

On this appeal—

De Gruyther, K. C., and *Arthur Gray*, for the appellant, contended that the respondent had failed to establish any family custom, affecting the family property generally, and particularly the self-acquired property, which over-rode the personal law of the parties as Muhammadans. The descent of the taluqa was governed by the grant of the sanad to Jamshed Ali Khan, and not by any family custom. That was shown by the nature of the return made by him to the Chief Commissioner's circular, dated the 30th of January, 1860 (see Syke's Compendium of Taluqdari Law, page 389) which was not based on any custom then in existence. The entry of his name in list 2 instead of list 3, which was the one applicable to his taluqa having regard to the circumstances under which it was made, raised, it was submitted, no presumption that any property of the family was held as impartible by custom prior to 1861. Reference was made to *Achal Ram* v. *Udai Partab Addiya Dai Singh* (1); and *Sheo Singh* v. *Raghubans Kunwar* (2).

(1) (1933) I. L. R., 10 Oudh, 511; L. R., 11 I A., 51.

(2) (1905) I. L. R., 27 All., 634; L. R., 32 I. A., 203.

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

At any rate no such presumption would apply to the self-acquired property, as to which there was no evidence to show that it was ever intended to be considered as an accretion to the taluqa Reference was made to *Janki Prasad Singh* v. *Dwarka Prasad Singh* (1); a decision, it was submitted, in favour of the appellant. There were instances in the wajib-ul-arzes of there having been partition of villages made between members of the family. As to the admissibility in evidence of the wajib-ul-arzes, *Lekhraj Kuar* v. *Mahpal Singh* (2), Oudh Land Revenue Act (XVII of 1876), section 17; section 35 of the Evidence Act (I of 1872); and Oudh Circular 20 of 1863, paragraph 3, were referred to. From the fact that the grant was made to the eldest son, no presumption of the impartibility of the estate arose; for it was only granted to him as representing the family; *Hyder Hossain* v. *Mahomed Hossain* (3). Custom regarding the manner in which an estate descends must be ancient and invariable, and must be established by clear and unambiguous evidence, and by a succession of instances in which the property has descended in the manner contended for; without them oral evidence as to tradition is of little effect as proof of the custom Reference was made to *Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar* (4); *Maharani Hira, Nath Koer* v. *Baboo Ram Narayan Sing* (5); Mayne's Hindu Law, 7th edition, page 56, paragraph 50, and Field's Law of Evidence, 5th edition, page 136.

A. M. Dunne and *B. Dube*, for the respondent, contended that on the construction of sections 8 and 10 of Act I of 1869 the fact that Jamshed Ali Khan's name was entered in list 2 was conclusive evidence that there was in the family an existing custom of descent to a single heir. Reference was made to *Bhai Narindar Bahadur Singh* v. *Achal Ram* (6) and *Muhammad Abdus Samad* v. *Qurban Husain* (7) There was only one rule of descent by Muhammadan Law, consequently all the property

(1) (1913) I. L. R., 35 All., 391; L. R., 40 I. A., 170.

(2) (1879) I. L. R., 5 Calc., 744; L. R., 7 I. A., 63.

(3) (1872) 14 Moo. I. A., 401 (407).

(4) (1872) 14 Moo. I. A., 570 (585).

(5) (1873) 9 B. L. R., 274 (294).

(6) (1893) I. L. R., 20 Calc., 649, L. R., 20 I. A., 77.

(7) (1903) I. L. R., 26 All., 119 (129 and 130); L. R., 31 I. A., 30 (36).

would be subject to the custom. It was not denied that there was a custom of descent to a single heir, though the descent was by primogeniture. If the entry of the name in list 2 was not conclusive as to the acquired property, there was a presumption that the custom applied to it, until rebutting evidence was adduced. *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1) and *Ibrahim Ali Khan* v. *Muhammad Ahsanullah Khan* (2). The entry of the name is of stronger value as evidence than the wajib-ul-arzes. The case of *Janki Prasad Singh* v. *Dwarka Prasad Singh* (3) was not applicable. The parties there were Hindus subject to the Mitakshara law, under which the rules of descent for self-acquired property were different from those for ancestral property The custom, it was submitted, was established by the evidence adduced by the respondent. It was contended for the appellant that it must be proved by actual instances of succession, but evidence of tradition was sufficient: see *Mohesh Chunder Dhal* v. *Satrughan Dhal* (4). It all depends on the mode of proof; the respondent proves it in the construction of the Act (I of 1869); that Act was completely complied with in this case as to the entry of the name in list 2. The burden of proof was on the appellant to show that the property in suit was subject to a different rule of devolution from the taluqa and he had not discharged it.

[Their Lordships intimated that they did not desire to hear the respondent further, and called on the appellant.]

De Gruyther, K.C., in reply, contended that no custom had been proved, and referred to Syke's Compendium of Taluqdari Law, pages 90—100 and 101, and the circular at page 392. By section 1 of Act I of 1869 that Act applies only to estates referred to therein, and the lists only apply to property dealt with by the Act: see section 8 and section 22, sub-section (11). Reference was made to the following cases in addition to those already cited:—*Jagatpal Singh* v. *Jageshar Bakhsh Singh* (5);

(1) (1884) I. L. R., 10 Calc., 792; L. R., 11 I. A., 135

(2) (1912) I. L. R., 39 Calc., 711; L. R., 39 I. A., 85.

(3) (1913) I. L. R., 35 All., 391; L. R., 40 I. A., 170.

(4) (1902) I. L. R., 29 Calc., 343 (353 and 354); L. R., 29 I. A., 62 (68).

(5) (1902) I. L. R., 25 All., 143; L. R. 30 I. A., 27.

1916

MUNTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

Bhaiya Rabidat Singh v. *Indar Kunwar* (1); *Hardeo Bux* v *Jawahir Singh* (2); *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer* (3), and *Jagdish Bahadur* v. *Sheo Partab Singh* (4). [*Dunne* referred to *Rajendra Bahadur Singh* v. *Ram Raghubans Kunwar* (5)].

1916, July, 21st.—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

The facts of this case are fully set out in the judgements of the Judicial Commissioners of Oudh, from whose decree dismissing the plaintiff's claim this appeal is preferred, their Lordships are thus relieved of the necessity of referring to them at any length

The suit was brought in the court of the Subordinate Judge of Sultanpur to recover from the defendant, the taluqdar of Deogaon, in the district of Fyzabad, a half-share of certain non-taluqdari property to which the plaintiff claims to be entitled by right of inheritance under the Muhammadan law.

At the time of the annexation of Oudh the taluqa of Deogaon was found to be in the possession of one Babu Jamshed Ali Khan under a firman of the deposed King, bearing date the 23rd Shaban, 1271, corresponding with the 11th of May, 1855. On the 19th of December, 1858, a summary settlement of this property was made with him by the British Government. The *Kabulrat*, or engagement for the payment of revenue, executed by Jamshed Ali Khan, bears date the 22nd of January, 1859. On the 17th of October, 1861, he received a *sanad* conferring on him the full proprietary right, title and possession of the estate of Deogaon and of Almasgunj, consisting of the villages in the list attached to his *Kabuliat*. This *sanad*, among other conditions, declared as follows:—

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir, i.e., sons, nephews, etc., according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest or adoption, to whomsoever you please."

(1) (1888) I. L. R., 16 Calc., 556; L. R., 16 I. A., 53

(2) (1877) I. L. R., 3 Calc., 522; L. R., 4 I. A., 178.

(3) (1877) I. L. R., 3 Calc., 626 (644) L. R., 4 I. A., 238 (240).

(4) (1901) I. L. R., 23 All., 359 (362) L. R., 28 I. A., 100 (110).

(5) (1908) 11 Oudh Cases, 256 (259).

Jamshed Ali Khan died in 1865; his name, however, is found entered as taluqdar in the lists 1 and 2 mentioned in Act I of 1869 (the Oudh Estates Act).

He was succeeded by his son Raja Azam Ali Khan, who appears to have acquired between 1868 and the time of his death considerable property, movable and immovable, which, not coming within the meaning of the word "estate," defined in Act I of 1869, is usually called the non-taluqdari property. The plaintiff's claim relates to a half share of this property on the ground that it is not subject to the rule of devolution applicable to the estate or taluqa.

Raja Azam Ali Khan died in October, 1899, leaving two sons, Mustafa Ali Khan and the present plaintiff, and the former as the elder succeeded to the estate by the rule of primogeniture in accordance with the provisions of the *Sanad* and the rule laid down in section 22 of the Act. He also obtained possession without dispute, so far as appears on the record, of all the non-taluqdari property and held the same until his death in July, 1909, when he was succeeded by his son, the minor defendant, Yasin Ali Khan.

The plaintiff brought his suit on the 12th of April, 1910, and the main basis of his claim is that the property in dispute is not subject to the rule of succession by primogeniture, which regulates the descent of the taluqa, but is governed by the ordinary Musalman law of inheritance, and that accordingly Mustafa Ali Khan and he became entitled on the death of their father to equal shares in the same.

The defendant, in his answer, pleaded that the property in dispute was an accretion to the ancestral estate and was, therefore, subject to the same rule of descent as the taluqa, and that even if it were not so regarded, his father, and, on the death of his father, he himself became under the old family custom solely entitled to the said property. These contentions took a concrete shape in the statements of the respective pleaders recorded by the Subordinate Judge on the 14th of June, 1910. The plaintiff's pleader appears to have stated that the present claim was exclusively confined to properties that had been acquired by Raja Azam Ali Khan, and did not relate to the taluqa; and

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

he contended that Act I of 1869 applied neither to the taluqa nor to the villages in dispute, though the taluqa descended to a single individual by the rule of primogeniture under the *sanad*. He further denied the existence of any family custom. The defendant's pleader, on the other hand, urged that the Act applied to both classes of property, and that, apart from the Act, family custom governed the descent of such property as was not included in the estate under the Act.

The sixth issue framed by the Subordinate Judge relates to the question of custom, and is in these terms :—

"6. Whether there exists any custom in the family of the parties relating to the acquired property under which a single member becomes the owner, and according to which the father of the defendant and the defendant alone became entitled?"

The *onus* of establishing the family custom was placed on the defendant; and although his pleader appears to have objected that this burden was wrongly thrown on him, he produced a considerable body of evidence, oral and documentary, in support of his allegation regarding the course of descent relating to the family property. The plaintiff, in rebuttal, as it is called, of the case made by the defendant, gave his own evidence and examined his sister, a lady of the name of Kanis Batul, widow of the late Nawab of Hasanpur. He also produced some wajib-ul-arzes, or village administration papers for several years ranging from 1864 to 1873. To these their Lordships will refer, very shortly, later on.

On the question whether Act I of 1869 applied to the estate of Deogaon, the Subordinate Judge held, in substance, that as Jamshed Ali Khan had died before it came into force, his name was wrongly entered in the lists prepared under the Act; and that consequently, the status not being applicable, no presumption with regard to custom could arise thereunder.

This view as to the non-applicability of the Act to the taluqa itself, which was not attempted to be supported before this Board, was rightly overruled by the learned Judges on appeal and their Lordships will not refer to it further. Having held that no presumption could arise from the inclusion of the taluka in list 2 as the Statute did not apply to it, the Subordinate Judge proceeded to consider the evidence. Among

this were two important documents, one a petition of Raja Azam Ali Khan bearing date the 27th of May, 1873, presented to the revenue authorities, and the other a written statement filed in Court on the 15th of February, 1868. In both there were clear and explicit statements of the deceased Raja regarding the custom which governed the devolution of property in his family. Both these statements the Subordinate Judge ruled out of consideration as he thought they referred only to the taluqa, and had, therefore, no bearing on the question of succession to the non-taluqdari property.

Dealing with the oral evidence, thus detached from any support from the documents, the trial Judge characterizes the defendant's witnesses, many of whom appear to be men of substance, and some of standing and position, as "tutored," and their testimony as wholly untrustworthy; and, relying on the wajib-ul-arz papers, and in some measure on the statement of the plaintiff's sister, he came to the conclusion that the defendant had failed to prove the custom alleged by him. He accordingly decreed the plaintiff's claim. This decision has been reversed on appeal by the Judicial Commissioners, who have dismissed the suit with costs in both courts. Shortly stated, they have held that the estate of Deogaon is within the Statute, and, by virtue of the provisions of the Act, there was a presumption in favour of a pre-existing custom attaching to the taluqa which threw on the plaintiff in this case the *onus* of showing that the non-taluqdari property was subject to a different rule of devolution. They also considered the oral testimony adduced by the defendant as reliable, and referred to Raja Azam Ali's statements with regard to the custom of the family as showing that he made no distinction between ancestral and acquired property.

The judgement of the Judicial Commissioners has been assailed in this appeal chiefly on two grounds: *firstly*, it is contended that the presumption on which the learned Judges have mainly rested their decision, has been wrongly raised and wrongly applied; and, *secondly*, that the *onus* has been wrongly thrown on the plaintiff, inasmuch as it lay on the defendant, as established in *Janki Prasad Singh* v. *Dwarka Prasad Singh* (1),

(1) (1913) I L R., 35 All., 391: L.R., 40 I.A., 170.

1916

MURTAZA HUSAIN KHAN v MUHAMMAD YASIN ALI KHAN

known locally as the *Ranmau* case, to prove affirmatively the custom alleged by him. The two points are so closely inter-related that their Lordships do not propose to discuss or consider them separately.

The contentions of the parties on the question of presumption rest on the provisions of sections 8 and 10 of the Act; and although these sections have formed the subject of discussion in several previous decisions of this Board, it becomes necessary again for the purposes of this judgement to refer to them shortly. Section 8 provides that "within six months after the passing of the Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor General of India, shall cause to be prepared six lists, namely, *first* a list of all persons who are to be considered taluqdars within the meaning of the Act." As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on the 22nd of January, 1859, a taluqdari *sanad* was granted to him on the 17th of October, 1861, and his name was entered as a taluqdar in the first of the lists. He had acquired, as declared by section 3, "a permanent, heritable and transferable right" in his estate, and was unquestionably a taluqdar within the meaning of the Act. His death, before the Act was passed into law, makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to "cause to be prepared" were obviously in course of preparation long before the passing of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such taluqdars.

List 1 is a general list of all taluqdars, without distinction as to the course of descent in their families in respect of the taluqa. The classification of taluqdars on the basis of the devolution of the estate begins with list 2, which is "a list of taluqdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir." The use of the word "ordinarily" clearly implies that an occasional variation would not affect the "custom" of devolution.

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

The third is "a list of the taluqdars, not included in the second of such lists, to whom *sanads* or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sanads* or grants shall thereafter be regulated by the rule of primogeniture."

On behalf of the appellant, it is contended that, although the name of Jamshed Ali Khan is included in list 2, the fact that the succession is declared in the *sanads* to go by primogeniture shows that the estate really came under list 3 and not under list 2, and that, consequently, no presumption as to a custom relating to the descent of the estate can arise. In support of this contention, reference is made to the Chief Commissioner's circular, dated the 18th day of January, 1860, by which the taluqdars were invited "to file a written declaration," expressing their desire that their estates should not be sub-divided at their death "or in any future generation." A similar expression of wish was invited from such taluqdars as had received *sanads*, "and in whose families the law of primogeniture does not prevail."

It appears that in response to this invitation, Jamshed Ali Khan submitted, on the 6th day of February, 1860, the following representation :—

"SIR,—The British Government has been pleased to confer upon me the proprietary rights of the Deogaon estate, pargana Jagdispur, district Fyzabad I, therefore, wish and pray that after my death my estate may be allowed to continue in my family, generation after generation, in its entirety, without partition, according to the custom of *raj-gaddi*, and the younger brother may get the maintenance from the *gaddi-nashin*."

It is urged that these two documents, taken together, show that family custom or usage did not form the basis of the declaration as to the rule of descent by primogeniture, which does not come under list 2 but comes only under list 3. This proposition is attempted to be supported by reference to certain dicta, or rather expressions, of this Board in the case of *Achal Ram* v. *Udai Partab Addiya Dat Singh*(1) and in that of *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (2). The appellant's contention receives

(1) (1888) I. L. R., 10 Calc., 511 ; L. R., 11 I. A., 51.

(2) (1884) I.L.R., 10 Calc., 792, L. R., 11, I. A., 135.

1916

MORTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN

some colour from the words of Sir BARNES PEACOCK, who delivered the judgement of the Board in *Achal Ram's* case, "that when a taluqdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture." But it must be observed that that case proceeded on its own special facts; the taluqdar, Pirthi Pal Singh, whose name had been entered in list 2, had died before the Act came into force; there was no dispute, however, that the succession to his estate was governed by the Act. He left no heir coming within the first five sub-sections of section 22, and the property had accordingly "descended" to the widow, who held it for her life time; and after her death it was held by her daughter. On the death of the daughter, Achal Ram, her husband, took possession of the estate. The suit by Udai Partab was brought to recover possession of the estate from Achal Ram, on the ground that he, Udai Partab, was entitled as the nearest male agnate of the deceased taluqdar. The case really fell within sub-section (11) of section 22, and the issue relating to descent by right of lineal primogeniture did not directly arise in it.

Their Lordships think that the views expressed by Sir BARNES PEACOCK must be read in conjunction with the facts of the case and ought not to be extended so as to exclude the rule of descent by primogeniture from the scope of list 2. In fact, in *Thakur Ishri Singh's* case decided shortly after, where also the deceased taluqdar's name was inserted in lists 1 and 2, Sir ARTHUR HOBHOUSE (afterwards Lord HOBHOUSE), delivering the judgement of the Board, used the following language: "Now, however true it may be that, if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the rule of primogeniture, it is impossible to say there is no such guide in this case." It was found in *Thakur Ishri Singh's* case that the deceased taluqdar Bani Singh had in his life-time, on the 20th of February, 1860, in answer to the Chief Commissioner's circular letter already referred to, stated the usage in his family to be the selection of "an able one" out of several sons "without reference to seniority"

to succeed to the estate; "that is to say, according to him," adds Sir ARTHUR HOBHOUSE, "that law which is familiar to us under the name of tanistry, or something very like it, prevailed in his family." The conclusion is thus expressed :—

"The question is, whether the appellant, having the *onus probandi* on him to show that primogeniture is the law of the family, has proved his case, and he certainly is very far indeed from proving his case, the evidence, so far as it goes, being the other way."

This decision certainly does not exclude descent by rule of primogeniture from the scope of list 2; whilst section 22 expressly declares that succession *ab intestato* to the estates of talukdars whose names are inserted in list 2, equally with those entered in lists 3 and 5, shall be by lineal primogeniture It provides in the first three sub-sections as follows :—

"If any talukdar or grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, viz.:—

"(1) To the eldest son of such talukdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased;

"(2) Or if such eldest son of such talukdar or grantee, heir or legatee, shall have died in his father's life-time, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid,

"(3) Or if such eldest son of such talukdar or grantee, heir or legatee, shall have died in his father's life-time without leaving male lineal descendants, then to the second and every other son of the said talukdar or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid."

The amendments made by the Oudh Estates (Amendment) Act of 1910 do not affect the matter.

Their Lordships are, accordingly, of opinion that there is no substance in the contention of the appellant based on the difference in the phraseology of section 8 relative to lists 2 and 3 that descent by primogeniture is confined to cases coming under list 3. Section 10 of the Act after declaring that "no persons shall be considered talukdars or grantees within the meaning of the Act, other than the persons named in such original or

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

supplementary lists as aforesaid" (s. 9), provides that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees," that is, "within the meaning of the Act."

This does not mean they shall be conclusive merely as to the fact that the persons entered therein are taluqdars as defined in section 2; in their Lordships' opinion, the provision of section 10 goes much further; it means that the courts shall regard the insertion of the names in those lists "as conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. For example, in list 2 such taluqdars alone are included, whose estates, according to the custom of the family "on and before the 13th of February, 1856" (the date of the first annexation of Oudh), "ordinarily descended upon a single heir." Their title to have their names inserted in that list is based on the specific family custom set out in the section. Under section 10 the courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based.

In the present case Jamshed Ali Khan's name was included in list 2; it could only have been done by virtue of a pre-existing custom governing the devolution of the estate to a single heir. Section 10 makes the entry of his name in list 2 conclusive evidence of that fact. There is no dispute that in this case the estate descends by lineal primogeniture; the only question for determination is whether the custom which has thus received statutory affirmation with respect to the estate attaches also to the non-taluqdari property, and governs its devolution.

The provision as to conclusiveness contained in section 10 is confined to estates within the meaning of the Act; it does not apply to non-taluqdari property. The existence, however, of the pre-existing custom gives rise to a presumption. It is urged on behalf of the appellant that this presumption is not enough; and that the defendant must establish affirmatively the course of descent alleged by him. The contention that the *onus* lies primarily on the defendant is supported by a reference to

1916

MUBTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

the decision of their Lordships in the case of *Janki Prasad Singh* v. *Dwarka Prasad Singh* (1). The plaintiff in that case had obtained a decree in the courts in India for a half-share of the after-acquired properties of the taluqdar, on the ground that the defendant had failed to establish that by the custom of the family these acquisitions became part of the original estate, and were, therefore, not subject to the ordinary rules of inheritance; and this decree was upheld by this Board. That case had arisen in a family subject to the law of the Mitakshara, which recognizes two courses of devolution in the case of what is called "obstructed inheritance": the ancestral property descending in one channel, the self-acquired property in another. Even where the estate is impartible, this distinction in the course of descent is recognized. This is exemplified in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer* (2) (a case under the Oudh Estates Act), where, in making the decree, their Lordships added the following limitation :—

"The declaration, however, must, their Lordships think, be limited to the talook and what passes with it. If the Maharaja had personal or other property not properly parcel of the talookdari estate, that would seem to be descendible according to the ordinary law of succession."

Similar differentiation was made in another Mitakshara case, which, however, did not arise in Oudh, but which equally exemplifies the rule—*Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (3).

Unless there be a custom by which self-acquired properties in a Mitakshara family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended to incorporate such acquisitions with the estate, they descend by the ordinary law of inheritance. For example, where the owner of an ancestral, impartible estate, possessed also of self-acquired properties, dies leaving lineal male descendants, as the inheritance is "unobstructed," both classes of property go to them; supposing, however, he were to die leaving no male progeny in the direct line, but a widow and a divided agnatic relation, in the absence of a custom the self-acquired property would go to the

(1) (1913) L. R., 35 All., 391; L. R., 40 I. A., 170.
(2) (1877) I. L. R., 3 Calc., 626 (644); L. R., 4 I A, 226 (246)
(3) (1909) I. L.R., 29 Calc., 493 (453); L. R., 29 I A, 82 (96).

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

widow, whilst the estate would devolve on the agnatic heir. The *onus* of establishing a custom *dehors* the ordinary rule in such a case would lie on the person asserting it. This was the principle on which their lordships proceeded in *Janki Prasad Singh's* case.

The Muhammadan law makes no distinction between ancestral and self-acquired property, and recognizes no principle of differentiation in the matter of lineal and collateral succession, as is the case under the Mitakshara, which divides inheritance into "unobstructed and obstructed heritage." All classes of property, whether ancestral or self-acquired, follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the taluqa to establish it.

Their Lordships are of opinion that the Judicial Commissioners in the present case were right in holding that the Subordinate Judge had wrongly placed the *onus* on the defendant. As already observed, a pre-existing custom relating to the descent of the ancestral estate to a single heir received statutory affirmation in 1869. The presumption is, the family being Muhammadan, that prior to 1856 the same rule of devolution applied to the self-acquired property of the previous owners, and applies to the acquisitions of Raja Azam Ali Khan. That presumption the plaintiff has sought to rebut by statements and recitals contained in a number of wajib-ul-arz papers. A wajib-ul-arz is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families, not even of the narrators, stand in no better position than any other tradition.

The following facts connected with Jamshed Ali Khan's family will make this absolutely clear. It may be taken as a historical fact that some four centuries ago a Rajput adventurer of the name of Barawand Singh or Raja Barar, of the Rae Bareli

district, raided into the Fyzabad district, and after ousting the Bhar inhabitants from their ancient possessions, established himself there with his clan, apparently since then called the *Bhale Sultan* clan, on account of their prowess with the pike or lance Barar's descendants appear to have multiplied immensely, some have remained Hindus, others have adopted the Moslem religion. Tradition ascribes the adoption of Islam to one of his early descendants, named Palandeo, who lived in the time of the Afghan Emperor Sher Shah, from whom he is said to have received the title of Malikpal. This Malikpal is claimed as the progenitor of the Musalman section of the Bhale Sultan clan. The fourth in descent from Malikpal was Pahar Khan, with whom according to the defendant's case began the origin of the Deogaon estate. The Pahar Khani section of the Musalman Bhale Sultans, to which the talukdar of Deogaon belongs, trace their descent to him whilst the Mubarak Khanis derive their origin from Mubarak Khan, his brother. The taluqdars of Mahona and of Uchgaon are Mubarak Khanis. The son of the taluqdar of Mahona (in the absence of his father in Mecca) has given evidence in this case on the side of the defendant on the question of the custom; so has the taluqdar of Uchgaon. Jamshed Ali Khan was the eighth in descent from Pahar Khan.

The wajib-ul-arz papers, on which the plaintiff relies, contain the statements of a number of Bhale Sultans, both Hindu and Musalman, regarding the origin of their respective title to the lands they hold in the several villages to which those papers relate. The history of their title is based purely on family tradition. They describe how after Barar and his clan settled in this district his descendants continued to split up, until several of them formed stocks of their own. In no case, however, they appear to bring down the tradition of division beyond Pahar Khan The plaintiff admits in his deposition that there has been no partition of the family property since the time of Alahdad Khan, the third in descent from Pahar. His own statement lends strong corroboration to the large volume of concurrent testimony regarding the rule or custom governing the descent of the entire family property, whilst the wajib-ul-arz papers, on which the first court relied, do not support the case put forward for him.

1916

MURTAZA HUSAIN KHAN v. MUHAMMAD YASIN ALI KHAN.

In their Lordships' opinion, the plaintiff has failed to establish that the devolution of the non-taluqdari property is subject to a rule different from that governing the estate, and his claim was rightly dismissed in the Judicial Commissioners' Court. Their Lordships will, therefore, humbly advise His Majesty that the decree of the appellate Court should be affirmed, and this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—*Watkins and Hunter.*

Solicitors for the respondent :—*Barrow, Rogers and Nevill.*

J. V. W.

---

*P.C.** 1916

June, 23
July, 27

JHANDA SINGH (PLAINTIFF) v. WAHID-UD-DIN AND OTHERS (DEFENDANTS)

[On appeal from the High Court of Judicature at Allahabad.]

Document, construction of—Deed of sale followed after an interval by an agreement for repurchase after stated period—Mortgage by conditional sale—Right of redemption—Intention of parties as evidenced by language of deeds, conduct of parties and surrounding circumstances—Suggested evasion of prohibition against interest by Muhammadans—Regulations I of 1772, and XVII of 1806.

The question in this appeal was whether two instruments in writing, a deed, dated the 29th of August, 1832, executed by the appellant's predecessors in title, purporting to be a deed of absolute sale of certain property, and an agreement, dated the 5th September, 1832, executed by the predecessors in title of the respondents reserving to the vendors a right to repurchase the property sold, on repayment of the original purchase money within nine or ten years, constituted when taken together, a mortgage by way of conditional sale of the property or an absolute sale of it with an agreement for repurchase. The deeds were separately stamped, and registered on different dates. The vendors never availed themselves of the conditions of reperchase, and the appellant sued in 1907 for redemption. The parties to the suit were Muhammadans.

Their Lordships of the Judicial Committee were of opinion that the intention of the parties, which was the test in such a case must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances, and came to the conclusion that on this principle the decree of the High Court appealed from, that the transaction was an out-and-out sale, and not a mortgage by conditional sale, should be affirmed.

Bhagwan Sahai v. *Bhagwan Din* (1) followed. *Balkishen Das* v. *Legge* (2) distinguished. *Alderson* v. *White* (3) referred to.

---

* *Present* :—The Lord CHANCELLOR (Lord BUCKMASTER), Lord ATKINSON, and Sir JOHN EDGE.

(1) (1890) I. L. R., 12 All., 387 ; L. R., 17 I. A., 98.

(2) (1899) I. L. R., 22 All. 149 ; L. R., 27 I. A., 58.

(3) (1856) 2 DeGex and J., 97 (105).

The provisions of a bond executed by the parties of even date with the sale deed refuted the suggestion that any of the parties to the sale deed had any religious scruples against the payment or receipt of interest on money lent, or that when intending to create a mortgage they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was in fact to be given and received.

With reference to a remark of Lord CRANWORTH, *L C*, in *Alderson* v. *White*, (1) that "I think a court after the lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be," their Lordships, commenting on the facts that the period of 10 years fixed in the present case for repurchase terminated in 1863, that the suit was instituted on the 5th of October, 1907, 44 years after the lapse of that period; that the judgement appealed from was delivered on the 11th March, 1911; that the record was not received at the Privy Council office till the 25th of February, 1915, and the appeal not set down for hearing until June, 1916, said "litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse."

APPEAL No. 18 of 1915, from judgements and decrees (22nd March, 1910, and 11th March, 1911) of the High Court at Allahabad, which affirmed a judgement and decree (27th March, 1908) of the Additional Judge of Meerut.

The question for determination on this appeal was whether a deed of sale of certain land, dated the 29th of August, 1852, acted on as such ever since, and a deed of agreement, dated the 5th of September, 1852, by the vendees to re-sell the same to the vendors upon conditions which were not availed of and lapsed, should now be held to be a mortgage by conditional sale with a right of redemption, or an out-and-out sale with a contract to repurchase.

The Additional Judge of Meerut held that the two deeds constituted an out-and-out sale with a contract to repurchase. On appeal a division bench of the High Court (Sir JOHN STANLEY, C.J., and BANERJI, J.) differed in opinion, the former upholding the decision of the Additional Judge, and the latter coming to the conclusion that the deeds constituted a mortgage by conditional sale. An appeal under section 10 of the Letters Patent of the High Court was heard by three Judges (RICHARDS, GRIFFIN, and TUDBALL, JJ.) who upheld the view taken by Sir JOHN STANLEY, C. J., and dismissed the appeal.

(1) (1858) 2 De Gex. and J., 97 (105).

1916

JHANDA SINGH v. WAHID-UD-DIN

The facts of the case, as to which there was no dispute, will be found fully stated in the judgement of Sir JOHN STANLEY, C.J., which, with all the other judgements delivered in the two hearings of the case in the High Court, is reported in I. L. R., 33 All., 585.

On this appeal—

De Gruyther, K.C., and *B. Dube*, for the appellant, contended that on the true construction of the two documents of the 29th of August, and 5th of September, 1852, the deed of sale and the agreement were parts of one and the same transaction, and the two together constituted a mortgage by way of conditional sale. The question was what was the intention of the parties, who were Muhammadans, and by their religion prohibited from taking interest in their business transactions. The form of mortgage by conditional sale was introduced by Muhammadan conveyancing as a mode by which the probibition against taking interest was virtually complied with, by putting a mortgagee in possession, as in an absolute sale and allowing him to take the profits derived from the property instead of interest on the money lent to the mortgagor, but providing for repurchase of the property by the mortgagor after a stated time. If the same provisions as were contained in these two documents had been put into one document, it would, it was submitted, have been properly construed as being a mortgage by conditional sale (see section 58 of the Transfer of Property Act (IV of 1882); and the fact that two documents, practically contemporaneous, though not registered at the same time, were employed ought to make no difference in that construction, which, under the circumstances, could be fairly presumed to have been the intention of the parties. The provision in the later deed (5th of September, 1852,) as to the repayment of the money (Rs. 5,500) mentioned in the earlier deed, by the vendors after 9 or 10 years "out of their own pockets," was more consistent with the whole transaction being a mortgage than a contract for resale; and the further provision that in case of refusal to re-convey the property the vendors might "deposit into the treasury of the Court the amount of consideration in the

1916

JHANDA SINGH v. WAHID-UD-DIN

regulation XVII of 1806, section 7. Reference was made to *Balkishen Das* v. *Legge* (1) which was relied upon as being a case similar to, and governing the present one. The case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was distinguished; and reference was also made to *Ali Ahmad* v. *Rahmat-ullah* (3); *Forbes* v. *Ameeroonissa Begum* (4) and *Abdullah Khan* v. *Basharat Husain* (5). The appellant, it was submitted, was entitled to redemption

A. M Dunne, for the respondents, was not called upon.

1916, July, 27th:—The judgement of their Lordships was delivered by Lord ATKINSON:—

This is an appeal from a judgement and decree, dated the 11th of March, 1911, of the High Court of Judicature for the North-Western Provinces, affirming a decree, dated the 27th of March, 1908, of the Additional Judge of Meerut.

The question for decision is whether two instruments in writing, the first, a deed dated the 29th of August, 1852, executed by the appellant's predecessors in title, and the second, an agreement dated the 5th of September, 1852, executed by the predecessors in title of the principal respondents, constituted when taken together a bai-bil-wafa mortgage of the property in the first mentioned instrument described, that is, a mortgage by way of conditional sale, or an out-and-out sale of the property with a contract for repurchase. The Additional Judge of Meerut held that the documents constituted the latter. On appeal to the High Court, the two members who constituted the Court, Sir JOHN STANLEY, Chief Justice, and Mr. JUSTICE BANERJI, were divided in opinion: the CHIEF JUSTICE concurring with the Additional Judge, and Mr JUSTICE BANERJI holding that the transaction amounted to a mortgage by way of conditional sale. Owing to this division of opinion the decree of the Court below stood, and by decree, dated the 22nd March, 1910, was affirmed, and the appeal dismissed, but without costs.

(1) (1890) I. L. R., 22 All., 149 (159, 160): L. R., 27 I. A., 58 (67, 68).

(2) (1890) I. L. R., 12 All., 387 (390): L. R., 17 I.A., 98 (100).

(3) (1892) I. L. R., 14 All., 198.

(4) (1865) 10 Moo., I. A., 340 (348—351).

(5) (1913) I. L. R., 36 All., 48 (56): L. R., 40 I. A., 31 (36).

1916

JHANDA SINGH v. WAHID-UD-DIN

An appeal was then brought from this decree of the High Court under section 10 of the Letters Patent of that Court to three Judges. They were unanimously of opinion that the decision of the Additional Judge was right, and by their decree of the 11th of March, 1911, affirmed the decree appealed from and dismissed the appeal with certain costs. Of the six Judges, therefore, who considered the case five formed the opinion that the transaction effected by these two instruments was an absolute sale out-and out of the property mentioned in the deed of the 29th of August, with a contract for repurchase, and one that the transaction was a mortgage. It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. The deed of the 29th of August, 1852, sets forth that the vendors have sold to the vendees the entire twenty biswas zamindari property in mauza Phul with all the rights and interest appertaining thereto under Muhammadan Law, for a sum of 5,500 rupees, and that the vendees have purchased this property from the vendors in consideration of that amount; that the sale is valid, legal and enforceable; that the vendors have received the consideration for the sale and have put the vendees into the possession and enjoyment of the property with its cesses and revenues; and that they, the vendors, have no longer, as against the vendees, any right, title or claim to this property or to the purchase money in respect of it.

This deed upon its face purports to be an absolute deed of sale. It does not refer to any contemplated or antecedent agreement of resale or repurchase, and does not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for a certain definite sum.

The next document executed by the same parties is a so-called bond, dated on the same day, the 29th of August, 1852. It commences by reciting that besides receiving 5,500 rupees the consideration of mauza Murlipur Phul, pargana Meerut, as entered in the sale deed dated the 29th of August, 1852, they had borrowed from the vendees named in that instrument a sum

of 2,500 rupees, and had appropriated the same. The borrowers then covenant that they will pay this sum on demand, with interest at the rate of 6 annas per cent. per mensem. It then sets forth that to secure the debt the borrowers had hypothecated the whole zamindari property in mauza Jatauli, and that until the sum borrowed be paid they would not by sale, mortgage, or otherwise, alienate the hypothecated property.

In the face of the provision of this bond it is idle to pretend that any of the parties to the sale deed of the same date had religious scruples against the receipt or payment of interest on money lent, or that, when desiring and intending to create a mortgage, they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was, in fact, to be given and received.

That, however, is not the only significance of this bond. The appellant's contention is, and to be effective must be, that an agreement was come to between the parties that the twenty biswas zamindari property in the mauza should be mortgaged to the so-called vendees for a sum of 5,500 rupees, and next that that agreement should be carried out by a deed of sale and a contract for repurchase. If no such agreement was made before the deed of sale was executed and the latter deed was an afterthought, only suggesting itself after the sale deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction. Well, if the agreement for the granting of a mortgage had been arranged on or before the 29th of August, 1852, it seems strange that no reference whatever should be made to it in this bond, and still more strange that the parties should have gone out of their way to represent as an unqualified sale what was, in fact, merely a conditional sale. The recital in the bond is certainly more consistent with the contract for repurchase being an afterthought than the contrary.

The sale deed and this bond were both registered at 1 o'clock on the same day, the 18th of May, 1853.

1916

JHANDA SINGH v. WAHID-UD-DIN.

Now turning to the agreement of the 5th of September, 1852, seven days later in point of date than the two instruments already referred to, one finds that it begins by reciting that under the sale deed of the 29th of August, 1852, the parties to it had purchased the twenty biswas zamindari and revenue-paying property with the appurtenances in mauza Murhpur Phul for a sum of 5,500 rupees from the so-called vendors, and then proceeds to set forth that the executants are now willing to help and treat with kindness the vendors, and that of their own free will, they (the executants) covenant in writing that if the vendors after the lapse of from nine to ten years from the date of the execution of the deed pay to the executants the purchase money mentioned in the sale deed, i.e. the sum of 5,500 rupees, out of their own pocket without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh resale deed, on receipt of this sum of 5,500 rupees, and get mutation of names in the revenue papers. Stopping there for the moment, it is contended that this provision as to the payment of the 5,500 rupees out of the pocket of the vendors is more consistent with the transaction being a mortgage than an agreement for resale entered into from kindly feelings. Their Lordships cannot accept that contention. The stipulation is wholly inconsistent with the relation of mortgagor and mortgagee. It is very doubtful indeed, if it would not be illegal, as amounting to an encroachment on a mortgagor's right to redeem the mortgage property from whatever source he might procure the funds to do so. But if the executants, though *bonâ fide* and absolute purchasers for value of these lands, were yet, from kindly feelings to the vendors, themselves willing to restore the vendors to the possession and enjoyment of their property, it was quite natural that they should provide against a sale or mortgage which would result in merely putting some persons other than these former owners into the possession and enjoyment of the property purchased, substituting practically the new mortgagees or purchasers for the executants themselves. In their Lordships' view, this provision makes against this appellant's contention rather than in favour of it.

Much reliance, however, was placed upon the immediately succeeding provision of the agreement. It runs thus:—"In the event of our refusal, they have power to deposit into the treasury attached to the Court the amount of the consideration in the sale deed, *and* after institution of a suit in Court to purchase their property again." It was suggested by Mr. JUSTICE TUDBALL that the original document was not properly translated, and that the word *and* was improperly introduced after the words "sale deed." It may be so, but their Lordships do not think its omission would alter the sense of the passage. The wording of the first two lines leaves their meaning somewhat obscure. They may mean to confer upon the vendors the right and power to make this deposit, or they may possibly mean merely to state the fact that the vendors already possess this right and power having derived them from a source external to the agreement itself.

Their Lordships think that, having regard to the whole frame and wording of the document, the former, and not the latter, is the true meaning of this provision. Even on that view, however, it is contended on behalf of the appellant that, as the right and power thus conferred are the same or very similar to those conferred upon mortgagors by bai-bil-wafa mortgages, under the provisions of Regulations I of 1798 and XVII of 1806 framed under the Bengal Code, the provision clearly discloses the intention of the parties to create, in this instance, a mortgage of that character. On referring to these Regulations it will be seen that they apply to cases where there is a stipulation that unless the money borrowed be repaid, with or without interest, within a fixed period the sale should become absolute, and were designed to relieve the mortgagor from the necessity of proving that he had tendered, or was ready and willing to pay the money due within the time limited, especially in the case where the fact of the tender was denied by the lender, and also to afford the mortgagor the means of establishing before a Court of Judicature that he had in fact made the tender, or was willing to pay the amount due within the time limited, or to have it determined whether his having omitted to do so made the sale absolute.

1916

JHANDA SINGH v. WAHID-UD-DIN.

No doubt these provisions were intended to apply to mortgages effected by conditional sale and contracts for repurchase, and the fact that their machinery is made applicable to this case might, if the clause was properly drawn, disclose to some extent an intention that it was intended to create a mortgage; but the clause is extremely ill-drawn, and its provisions are self-contradictory. In its first portion it expressly provides that the repurchase can only take place, not during, but after the lapse of, nine or ten years from the date of the execution of the deed. In its latter portion, it provides that if the vendors be not ready to purchase the property within the aforesaid time, they shall have no claim to the property after the expiry of the period of ten years, and the vendees shall then have every power in respect of the property. It is impossible to say whether the parties intended that the vendees should be secure in the possession of the property for nine or ten years, and might then be got rid of, or whether their right to possession was to be defeasible at any time during the ten years and after that to become absolute.

A clause so obscure and contradictory cannot furnish any true guide to the intention of the parties.

In the case of *Balkishen Das* v. *Legge* (1) a certain period was fixed by the collateral agreement, within which the vendor was to be allowed to repurchase. The vendors were indebted to the vendees, their bankers, in a sum of 1,90,000 rupees. Three deeds were executed: the first two bore date the same day, and the last of the three was a mortgage of the vendor's factory. The first was, on the face of it, a deed of absolute sale of a certain taluq for a sum of 1,50,000 rupees, of which 1,37,333 rupees were to be retained as the amount due to the vendees under a previous mortgage of the same taluq for principal and interest, the balance being retained by the vendees in part-payment of a debt due to them by the vendors in respect of advances made by the former to run the vendors' factory. The second deed, dated the 4th of February, 1873, provided that if the vendors should on the 1st of March, 1876, pay, not the purchase money merely, but 15,000 rupees in addition, 1,65,000 rupees in all,

(1) (1899) I. L. R., 22 All., 149, L. R., 27 I. A., 58.

and such further sum as might be found to be due by them to the vendees in respect of the vendors' factories, they might repurchase. There was in this latter deed a provision similar to that in the present, in reference to depositing the sum to be paid to secure repurchase. Oral evidence was admitted by the Subordinate Judge for the purpose of proving the intention of the parties. This evidence was held to be inadmissible. No opinion was expressed upon the point whether a conditional sale becomes subject to an equity of redemption by force of the Bengal Regulations, independent of the intention of the parties. The real ground of the decision appears to have been this, that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed, and thus to give the bankers a security on the taluq for the debt due on the factory accounts. This, as Lord DAVEY, delivering the judgement of the Board, said, "gives the transaction the character of a mortgage so far as the factory accounts are concerned. And if it is to some extent a mortgage, it may well be held to be so entirely."

The case is entirely distinguished from the present, and it does not appear to their Lordships to follow necessarily from the words of Lord DAVEY, just quoted, that the decision might not, despite the identity of the dates of the two deeds and the presence of the provision as to depositing the amount to be paid, have been the other way had the debt on the factories not been consolidated. The case of *Bhagwan Sahai* v. *Bhagwan Din* (1) resembles the present case much more closely. There the two documents, the deed of sale and the contract for repurchase, bore the same date, the 20th of February, 1835. By the first Alam Singh purported to sell his entire property to Ganga Din for 4,000 rupees current coin. By the second, which recited the first, it was provided that, as a matter of favour, much kindness and indulgence, if the vendor should, within a period of ten years from the date of the deed, pay in a lump sum and without interest the 4,000 rupees, the vendee would accept the same and cancel the sale. It further provided that during the term of ten years the vendee should remain in possession, collect the rent, enjoy

(1) (1890) I. L. R., 12 All., 337; L. R., 17 I. A., 48.

1916

JHANDA SINGH v. WARID-UD-DIN.

the profits and be liable for loss, the vendors having no concern whatever, they should not claim profits and the vendee should not claim interest; and in case the whole of the principal should be not paid according to the terms of the document, "the vendors not to be able to cancel the deed by repayment of principal and interest." Sir BARNES PEACOCK, in delivering judgement, cited and relied upon the judgement of Lord CRANWORTH in *Alderson* v. *White* (1) in which much importance was attached to the fact that the sum to be repaid on repurchase was, as in the present case, the precise amount of the original purchase money. Lord CRANWORTH, at page 105 of the report, laid down the rule of law applicable to such cases as these, thus:—"The rule of law on this subject is one dictated by common sense, that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." That statement of the law by Lord CRANWORTH was approved of in *Manchester, Sheffield and Lincolnshire Railway Company* v. *North Central Wagon Company* (2). It may not be applicable to transactions governed by the Muhammadan law. It was apparently held applicable by Sir BARNES PEACOCK, who had vast experience of India and its people, to the case before him. In this particular case Sir BARNES PEACOCK decided that it was clear that the case was not one of mortgagor and mortgagee, but one of absolute sale with a right to repurchase within a period of ten years.

There is one other remark of Lord CRANWORTH'S in *Alderson* v. *White* (1) which is particularly applicable to the present case. He said:—"I think a court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." In the present case the period of ten years fixed for repurchase terminated in 1863. Not till the 5th of October, 1907, forty-four years after the lapse of that period, was this suit instituted. The judgement appealed from was delivered on the 11th of March, 1911. The record was

(1) (1858) 2 De Gex and J., 97 (105).

(2) (1883) 13 A. C., 554 (568).

not received at the Privy Council Office till the 25th of February, 1915, and the appeal not set down for hearing until June, 1916 Litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse.

On the whole case their Lordships are of opinion that the decree appealed from was right and should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant:—*Barrow, Rogers and Nevill.*

Solicitor for the 1st, 2nd and 54th respondents.—*Douglas Grant.*

J. V. W.

HAMIRA BIBI (PLAINTIFF) v. ZUBAIDA BIBI AND OTHERS (DEFENDANTS) AND AMINA BIBI AND OTHERS (PLAINTIFFS) v. ZUBAIDA BIBI AND OTHERS (DEFENDANTS)

P.C. 1916

May, 29, 30, 31
June 1, 2,
August 1.

[On appeal from the High Court of Judicature at Allahabad]

Muhammadan law—Dower—Interest on unpaid dower—Claim for, by widow allowed to take possession of her husband's estate to satisfy her dower-debt—Liability of widow in possession to account for profits of estate—Recognition by Muhammadan law of equitable principles in such a case.

Where a Muhammadan widow was allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income of it, and there was no agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower.

Held that on equitable considerations she was entitled to some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal rights to exact payment of her dower on the death of her husband; and such compensation for forbearance to enforce a money payment was best calculated on the basis of an equitable rate of interest. That appeared to be consistent with Muhammadan law [see the chapter on "The Duties (Adab) of the Kazi" in the principal works on that law], which clearly showed that the rules of equity and equitable considerations commonly recognized in the courts of Chancery in England are not foreign to the Musalman system, but are in fact often referred to and invoked in the adjudication of cases.

The decision in *Woomatool Fatima Begum* v *Meerunmussuza Khanum* (1) that "it would be inequitable to make the widow account for the profits, except

* *Present*:—LORD ATKINSON, Lord PARKER of WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

(1) (1866) 9 W. R. 318.

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

on the terms of allowing her reasonable interest on the dower-debt," was approved.

In suits brought by the other heirs against the widow for the taking of accounts, for a decree to the plaintiffs of their respective shares in case the dower-debt was shown to have been discharged, and for a decree for any sum received by the defendant in excess of her dower, the defendant set up a claim for interest on the unpaid dower-debt, and it being found that a portion of it remained unpaid, interest at six per cent. per annum was allowed on that amount

APPEAL No. 3 of 1913, consisting of two consolidated appeals from two decrees (11th August, 1910) of the High Court at Allahabad, which reversed two decrees (15th September, 1906) of the court of the Subordinate Judge of Gorakhpur.

The main points for determination on this appeal were whether dower payable by a Muhammadan husband to his wife in consideration of marriage is in the nature of an ordinary debt; and whether or not the widow of a Muhammadan, placed in possession of her husband's estate in lieu of her dower, was entitled when called upon by her husband's heirs to account for the rents and profits received by her during the period of her possession, to claim interest upon the amount of the dower.

The facts are sufficiently stated in the report of the case in the High Court (Sir JOHN STANLEY, C.J., and BANERJI and KARAMAT HUSAIN, JJ.) which will be found in Indian Law Reports, 33 All., 182.

On this appeal—

Sir H. Erle Richards, K.C., and *B. Dube*, for the appellants, contended that Zubaida Bibi, the principal respondent, was not entitled to claim interest on her dower. There was no "written contract" or "express agreement" for interest and therefore the Interest Act (XXXII of 1839) was not applicable to the case. The question must, it was submitted, be determined by the Muhammadan law, by which the taking of interest is prohibited. The Muhammadan law was applicable under section 37, sub-section 1 of the Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), a matter relating to dower being a question as to "marriage" within the meaning of that section. The Oudh Laws Act (XVIII of 1876), section 5; and the Punjab Laws Act (IV of 1872), section 5, and other local Civil Courts Acts are to the same effect but varying in terms. That was the sole reason why the

widow's lien for dower was recognized; and she is in respect of the dower-debt in the same position as any other creditor who is in possession as security for payment. Her lien extends only to the amount of the dower, and certain expenses connected with the property whilst she is in possession, and the lien ceases when the dower is paid off by what she receives from the property. Reference was made to Macnaghten's Principles of Muhammadan Law (Edition 1897), chapter XI, article 16, page 74, Baillie's Digest (Edition 1875), pages 776, 781, 801, 802; Hamilton's Hedaya, Volume IV, Book 48, page 199. The Usury Act (XXVIII of 1855), it was contended, did not repeal the Muhammadan law as to interest: see *Ram Lal Mookerjee* v. *Haran Chandra Dhar* (1), decided by PEACOCK, C J, though that decision was not followed in *Mia Khan* v. *Bibijan* (2), decided by PHEAR, J. In the cases of *Ameeroonnissa* v. *Mooradoonnissa* (3), *Nawab Mahomed Ameenoodeen Khan* v. *Moozuffur Hossein Khan* (4) and *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (5) the question of lien for dower has come before this Board for decision, but the question of interest was not raised. Some unreported cases which will be found referred to in the judgement of the High Court were also cited as being in favour of the appellants. The Interest Act (XXXII of 1839) not being applicable interest was not recoverable as damages: see *London Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (6) and *Juggomohun* v. *Kaisreechund* (7). The Indian authorities show that interest will not be allowed unless it appears that it was intended that interest should be given: *Mansab Ali* v *Gulabchand* (8). Interest on a decree was allowed in *Soorma Khatoon* v. *Attafoonnissa Khatoon* (9) and *Hubeeboonnissa Khatoon* v. *Shumsood-deen Ahmed* (10), but that was under the Interest Act, in the latter case from the date of suit only, the filing of the plaint being treated as a demand under that Act. Interest was allowed in *Woomatool Fatima Begum* v. *Meerunmunnissa Khanum* (11), but if Muhammadan law should govern the case, as is now contended, it was wrongly decided.

(1) (1859) 2 B. L. R., O.C., 130 (135).
(2) (1870) 5 B. L. R., 560
(3) (1855) 6 Moo. I. A., 211.
(4) (1870) 5 B. L. R., 570.
(5) (1871) 14 Moo. I. A., 377 (388, 389)
(6) [1893] A. C., 429 (437).
(7) (1822) 2 Moo. I. A., 220
(8) (1887) I. L. R., 10 All., 55 (90)
(9) (1863) 2 Hay., 210.
(10) (1860) 16 S. D. A., Ben., 810.
(11) (1868) 9 W. R., 318.

1926

HAMIRA BIBI v. ZUBAIDA BIBI.

De Gruyther, K.C., and *Abdul Majid*, for the respondents, contended that the prohibition of interest among Muhammadans was to be treated as a religious prohibition, and not a legal one. In executive opinion it was not considered part of the municipal law, but as being long since obsolete and not to be enforced in the Civil Courts. The customary interest of the country had for a long time past been tolerated by both Muhammadans and Hindus. Reference was made to *Mia Khan* v. *Bibiyan* (1) and Wilson's Anglo-Muhammadan Law, 4th Edition, page 28. The dower payable to the wife of a Muhammadan was a debt, and to be treated like any other debt; *Abdul Karim Khan* v. *Maqbul-un-nissa Begam* (2); no exception being made with regard to it as to interest. "Dower" stood on the footing of being only an ordinary debt, and when the widow was in possession in right of her dower, the whole foundation of her right as against the heirs was as being a creditor, and she was entitled to a reasonable amount of interest under the Acts XXXII of 1839 and XXVIII of 1855. There was no express text of Muhammadan law making a widow liable for mesne profits, or to account for them: she was in possession of her husband's estate as a matter of right: *Ameeroonnissa* v. *Mooradoonnissa* (3) and Macnaghten's Muhammadan Law, page 75, paragraph 19. There was no analogy whatever to the law of pledge: liability to account, and suits for an account are creations of English law and governed by equitable principles. Muhammadan law allows a widow compensation for her loss of interest on an unpaid dower-debt, as in *Woomatool Fatima Begum* v. *Meerunmunnissa Khanum* (4), which was followed in *Sahebjan Bewa* v. *Ansar ud-din* (5); and also in *Chaudhri Wasi Ahmad* v. *Maina Bibi* (6) decided on 3rd July, 1906, by Sir J. STANLEY, C.J., and KNOX, J., who said:—"It has been argued, and very strenuously argued, that according to Muhammadan law interest is not chargeable in respect of dower. We have been referred to a number of authorities, but none of them bear out this proposition. On the contrary, it appears to be well settled law that dower is a debt ranking at least equally

(1) (1870) 5 B. L. R., 500 (507).
(2) (1906) I. L. R., 30 All., 315.
(3) (1855) 6 Moo. I. A., 211 (219).
(4) (1855) 9 W. R., 318.
(5) (1911) I. L. R., 38 Calc., 475 (481).
(6) Unreported.

1916

HAMIRA BIBI v. ZUBAIDA BIBI

with other debts; that it is a debt there can be no doubt . . . but it appears to us to be clear that having been charged with the rents and profits, the widow certainly is entitled to reasonable interest in respect of so much of her dower-debt as remained undischarged by the rents and profits.". Interest on dower was allowed in *Soorma Khatoon* v. *Attaficonnissa Khatoon* (1); and in *Hubeebonnissa Khatoon* v. *Shumsooddeen Ahmed* (2); and there is nothing to show it was allowed under the Interest Act. As no express provision is made by the Muhammadan law, the Court should act according to "justice, equity, and good conscience" as provided by the Bengal, North-Western Provinces and Assam Civil Courts' Act (XII of 1887), section 37, sub-section 2; see *Mullick Abdool Guffoor* v. *Muleka* (3). The doctrines of Muhammadan law need not be applied where they are unadapted to the social and economic life in India or the nature of the property in suit; *Ibrahim Goolam Ariff* v. *Sailoo* (4).

Dube in reply. Under the Muhammadan law a creditor was not entitled to any benefit in consideration of his not suing for his debt: Baillie's Digest (Edition 1875), page 781. No compensation therefore should be given if Muhammadan law is followed. Liability for mesne profits was known to Muhammadan law. A widow is liable to account for all receipts, except the expenses of managing and maintaining the property: *Ramzan Ali Khan* v. *Asghari Begam* (5) and *Ahmed Hossein* v. *Mussamut Khodeja* (6).

1916, August 1st:—The judgement of their Lordships was delivered by Lord PARKER —

A short statement of the facts which have given rise to this litigation will explain the point for determination involved in these consolidated appeals.

One Shaikh Inayat-ullah, a Muhammadan inhabitant of the district of Gorakhpur, in the United Provinces of India, died in March, 1892, leaving him surviving a widow and a daughter, named respectively Zubaida Bibi and Najm-un nissa; a sister, Hamira

(1) (1865) 2 Hay, 210

(2) (1869) 16 S. D. A., Beng., 370.

(3) (1884) I.L. R., 10 Calc., 1112 (1128).

(4) (1907) I. L. R., 35 Calc., 1, L. R., 34 I A., 167.

(5) (1910) I. L. R., 32 All., 563

(6) (1868) 10 W. R., 369 (371)

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

Bibi; and two brothers, Khadim Husain and Ihsan-ullah, all of whom became entitled under the Sunni law, to which Inayat-ullah was subject, to certain specific shares in his estate. Besides the widow's share of one-eighth, Zubaida was entitled to her unpaid dower. This has been found in a previous proceeding to have amounted to the large sum of one lakh of rupees. The other heirs of Inayat-ullah not being in a position to pay this sum without apparently alienating at least a considerable part of the estate, allowed the widow to take or remain in possession of the whole to satisfy her claim out of the rents and issues of the landed property. It is not clear whether the widow was let into possession in the life-time of Inayat-ullah or after his death. But it is not disputed that since 1892, Zubaida has been in possession.

In 1902, the other heirs of Inayat-ullah brought a suit against her to recover possession of their shares. Their action was dismissed on the ground that it was misconceived, inasmuch as it was not a suit for the purpose of taking accounts, and thus ascertaining what portion of the dower-debt was then unsatisfied. The present suits were instituted with that object on the 15th of March, 1906, in the court of the Subordinate Judge of Gorakhpur, one by Hamira Bibi and the other by the widow and sons of Khadim Husain who had died either before or after the suit of 1902. The reliefs prayed for in both actions were the same, viz. *(a)* for the taking of accounts; *(b)* for decree to plaintiffs of their respective shares in case the dower-debt was found to be discharged, and *(c)* for an award to the plaintiffs of any sum found to have been received by her in excess of her dower. Zubaida in her defence, among other pleas, set up a claim for interest on her unpaid dower; she alleged that the income of the property was less than the interest she claimed; that, consequently the debt was still unsatisfied and that the plaintiffs were accordingly not entitled to recover possession of their shares in Inayat-ullah's estate.

The Subordinate Judge, who tried the case in the first instance, considered the defendant was entitled to interest at 6 per cent. per annum on her dower; that the interest thus calculated exceeded the annual net income from the estate, and that, therefore,

it was clear no portion of the debt was discharged. In the result, he dismissed both suits. On appeal to the High Court at Allahabad, the learned Judges took the same view as to the right of the widow, Zubaida, to receive interest; but they varied the decrees of the court of first instance with regard to the total dismissal of the suits; they made a declaration that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower-debt proportionate to such shares, which quota the learned Judges specified.

From these decrees of the Allahabad High Court the plaintiffs have appealed to His Majesty in Council, and the sole question for determination is whether the defendant Zubaida is entitled to any interest or compensation in respect of her dower unpaid at the time of Inayat-ullah's death. The case has been elaborately argued on both sides and a large number of authorities have been cited. On behalf of the plaintiffs it has been argued with considerable force that the Musalman law prohibits usury and usurious dealings between Moslems; that dower is a liability springing under the provisions of that law from the status of marriage, and that, therefore, all incidents and rights connected therewith must be subject to the Musalman law. It was further contended that the Muhammadan widow's lien on the husband's estate for unpaid dower is the only creditor's lien which has been recognized and maintained intact by British Courts of Justice, and that it ought not to be extended beyond what the Musalman law itself permits by allowing interest when it is not contracted for. On the other side, it is argued that the Muhammadan law prohibiting usury has been repealed in India by Act XXVIII of 1855, and that consequently there is no bar to Musalmans receiving or paying interest, and that the practice of receiving interest is common among them both in India and other countries. It is further urged that, in any event, the widow is entitled to some interest by way of damages for non-payment of dower at the due time.

In the view their Lordships take of the case it is unnecessary in their opinion to examine much of the argument addressed to the Board or to discuss the numerous cases cited at the Bar.

There is a conflict of judicial opinion in India on the question whether the Musalman rule relating to usury was or was not abrogated by Act XXVIII of 1855. Sir BARNES PEACOCK, C.J.,

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

sitting with Mr. JUSTICE MACPHERSON held, in the case of *Ram Lal Mookerjee* v. *Haran Chandra Dhar* (1) that it was not. "Hindu law," he said, "did certainly as between Hindus restrict the rate of interest to be charged, and I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Muhammadan law as to interest." Then after reciting the preamble of the Act, he added as follows:—"That Act" (meaning Act XXVIII of 1855) "did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." In a later case (2) Mr. JUSTICE PHEAR sitting with MARKBY, J., took a different view. In the ordinary course, on this difference of opinion arising between two Division Benches of the same Court, the case should have been referred to a Full Bench. But PHEAR, J., did not take that course and decided the point differently, holding that the Act of 1855 had abrogated the Musalman law prohibiting usury. Their Lordships do not think it necessary to decide on the present occasion which view is right, nor do they think that Act XXXII of 1839 has any application.

Dower is an essential incident under the Musalman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this

(1) 3 B. L. R., O. C., p. 130. (2) *Mir Khan* v. *Bibjan*, 5 B. L. R., 500.

is the only creditor's lien of the Musalman law which has received recognition in the British Indian Courts and at this Board.

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made, as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The Duties (*Adab*) of the Kazi" in the principal works on Musalman law, which clearly shows that the rules of equity and equitable considerations commonly recognized in the Courts of Chancery in England are not foreign to the Musalman system, but are in fact often referred to and invoked in the adjudication of cases.

In the case of *Woomatul Futima Begum.* v *Mesrunnunnissa Khanum* (1) the plaintiff, who had held possession of her husband's estate under a lien for dower, was dispossessed by a decree of the court. She then sued one of the heirs for a proportionate amount of her dower. Among other questions raised, the defendant claimed that the plaintiff must account for mesne profits during the period she held possession. Sir BARNES PEACOCK, sitting with JACKSON and MACPHERSON, JJ., after remarking that the "plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the term she held it in lieu of her dower," discussed various considerations which led him to think

(1) (1868) W. R., 318.

1916

HAMIRA BIBI v. ZUBAIDA BIBI.

that it would be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest on her dower debt. The annual rents and profits being less than such reasonable interest, the claim for mesne profits was disallowed. Their Lordships think that this was in accordance both with sound sense and with law.

In the present case the courts in India have allowed the defendant, on taking her accounts, 6 per cent. per annum, by way of equitable compensation.

It was not contended that, if interest by way of compensation were allowed at all, this rate was too high under the circumstances. The contention was that no interest by way of compensation could be allowed at all.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants—*Barrow, Rogers and Nevill.*

Solicitor for the respondent—Najmunnisa Bibi: *Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

1916.

May, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

BAIJNATH PRASAD SINGH AND OTHERS (DEFENDANTS) *v.* TEJ BALI SINGH (PLAINTIFF).*

Hindu Law—Impartible estate—Succession—Primogeniture—Estate once in the possession of a family regranted after loss of possession to one member of the same family—Construction of grant

The question whether a certain estate is impartible or not is one of fact in each case.

Where an impartable estate is lost to a certain family and on the representation of a member of that family the Government puts him into possession making a grant in his favour without any special terms or condition in the grant, the property so restored would be joint family property in the hands of the member of the family to whom the grant is made.

When the Government makes a grant of an estate it can determine the nature of the grant; but in the absence of specific terms in the grant the surrounding circumstances must not be ignored.

* First Appeal No 90 of 1915, from a decree of E. Bennet, Subordinate Judge of Mirzapur, dated the 3rd of March, 1915.

1916

BALINATH PRASAD SINGH v. TEJ BALI SINGH.

The normal constitution of a Hindu family is union. And it is the very essence of an impartible estate that there is no legal right to insist on partition. The estate is enjoyed by the whole family through the occupant of the *gaddi*.

Held that when an impartible estate passes by survivorship from one line of descent to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line.

Held, further, that if the descendants of a junior member of an impartible estate partition the property given to their ancestor for maintenance, it is not conclusive on the point as to whether the estate has ceased to be joint for the purpose of finding out a successor to the *gaddi*. *Kachi Yuva Rangappa Kalakka Thala Udayar* v. *Kachi Kalyana Rangappa Kalakka Thala Udayar* (1) *Kalama Nalchiar* v. *The Raja of Shivaganga* (2), *Doorga Persad Singh* v. *Doorga Konwari* (3), *Sivee Rajah Yanumula Venkayamah* v *Sivee Rajah Yanumula Boochia Venkondora* (4), *Sartey Kuari* v *Deoraj Kuari* (5), *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6), *Bachoo Harkisendas* v. *Mankoreka* (7), *Raja Rup Singh* v. *Rani Basai* (8) and *Nayagani Achammagaru* v. *Venkatachalapati Nayaniwaru* (9) referred to. *Sri Raja Satrucharla Jagannadha Razu* v *Sri Raja Satrucharla Ramabhadra Razu* (10), *Venkatarayadu* v. *Venkataramayya* (11), *Venkata Narasimha Appa Row* v *Parthasarathy Appa Row* (12) and *Brij Indar Bahadur Singh* v. *Kanee Janki Koer* (13) distinguished.

THIS was a suit for the possession of an estate situate in the Mirzapur district known as the Aghori-Barhar estate, certain movables appertaining thereto, and for mesne profits. The allegations were that by virtue of a custom of succession by the rule of lineal primogeniture the plaintiff was the successor to Raja Kesho Saran Shah, the last male holder of that estate, who had died childless on the 4th of March, 1871, but with the intervention of a life-estate unto the widow of the said Raja, one Rani Bed Saran Kunwar, with a vested remainder unto the eldest member of the senior branch of collaterals living at the time of the death of the last male incumbent dying childless, under another family custom. A further allegation was that the said Raja at the time of his death recognized the said customs and directed that the Rani should have a life-estate in the said property and should be succeeded thereto by the plaintiff's father Babu Jagannath Prasad Singh, since deceased, who was eldest member of the

(1) (1905) I. L. R., 28 Mad., 503
(2) (1863) 9 Moo. I. A., 543
(3) (1876) I. L. R., 4 Calc., 190
(4) (1870) 13 Moo. I. A., 333
(5) (1881) I. L. R., 10 All., 272.
(6) (1915) I. L. R., 42 Calc., 1179.
(7) (1904) I. L. R., 29 Bom., 51.
(8) (1884) I. L. R., 7 All., 1.
(9) (1881) I. L. R., 4 Mad., 250.
(10) (1891) I. L. R., 14 Mad., 237.
(11) (1901) I. L. R., 15 Mad., 284
(12) (1918) L. R., 44 I. A., 51.
(13) (1877) L. R., 5 I. A., 1.

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH.

senior branch of collaterals at the time. The subjoined pedigree explains the relationship of the parties :—

RAJA FATEH BAHADUR SHAH

- Raja Shankar Shah.
- Babu Anant Bahadur Singh.
- Babu Subhavan Singh.
- Babu Kalyan Singh.

Raja Shambhu Shah. — Babu Dutt Singh. — Babu Sakat Singh.

Sudist Narain Shah.

- Raja Adil Shah = Rani Shankar Kunwar (obtained a grant from Warren Hastings in 1781 and died in 1794). — Raja Run Bahadur Shah.
- Babu Bhup Narain Singh. — Raja Run Bahadur Shah, adopted by Raja Adil Shah.
- Babu Richpal Singh. — Babu Bisheswar Bux Singh. — Babu Sarup Narain Singh

Babu Dookunandan Singh

- Rajah Maharudhwaj Shah = Rani Jai Chand Kunwar — Raja Raghunath Shah.
- Babu Birbhadr Shah — Raja Raghunath Shah
- Babu Jagannath Prasad Singh, died on 14th October, 1910
- Babu Baijnath Prasad Singh, defendant No. 1
- Babu Bishnath Prasad Singh, defendant No. 2

Babu Bindeshri Prasad Singh. — Rajah Kesho Saran Shah, died on 4th the March, 1871 = Rani Bed Saran Kunwar, died in 1913

- Babu Tej Bali Singh, plaintiff
- Babu Rajendra Bahadur Singh.
- Babu Kalika Prasad Singh.
- Babu Anúta Bux Singh.
- Babu Jang Bahadur Singh, defendant No 3.
- Babu Upendra Bahadur Singh, defendant No. 4.

It appears that after the death of Raja Kesho Saran Shah, the estate was taken charge of by the Court of Wards as the Rani was then a minor. At the time of the death of the said Raja neither Babu Bindeshri Prasad Singh nor Babu Jagannath Prasad Singh, though approached by the Collector of Mirzapur

with a request that the estate be taken charge of by the Court of Wards owing to the minority of the said Rani, did set up any right by virtue of any of the aforesaid customs. The estate was released by the Court of Wards in 1885. Subsequently the Rani made certain alienations. Whereupon, on the 17th of June, 1893, Babus Jagannath Prasad Singh, Baijnath Prasad Singh and Biswanath Prasad Singh applied under section 194, Act XIX of 1878, praying that, as, owing to certain specified acts of waste and mismanagement, there was an apprehension of injury to their reversionary interests, the estate might again be taken charge of by the Court of Wards. This application failed, and the Rani continued in possession and made certain other alienations in favour of one Pandit Banarsi Misir of Benares. On the 14th of October, 1910, the plaintiff's father, Babu Jagannath Prasad Singh, died. Under a lease, dated the 1st of October, 1912, 67 villages were leased out to defendants 3 and 4 on long terms by the Rani. Prior to this, on the 13th of January, 1912, the Rani had executed a will in favour of the defendant No 1. On the same day the defendants Nos 1 and 2 had executed an instrument whereby they had ratified all the acts of alienation by the Rani. On the 4th of November, 1912, the Rani executed a deed by which she relinquished in favour of defendant No 1 all the rights in the estate which she possessed as a Hindu widow in her husband's property and all the interest which she had in the Aghori-Barhar estate, of which she alleged she had become the owner after the death of her husband and of which she asserted herself to have been in proprietary possession. She also asserted therein that under the Hindu law the defendants Nos. 1 and 2 would inherit the estate after her death, and that the defendant No. 2 had signified his assent that the surrender should be made to the defendant No. 1 by attesting the deed as a witness.

The defendant No. 1 got possession of the estate under this deed of surrender, and has been in possession thereof since. The Rani died on the 31st of March, 1913. The plaintiff therefore brought this suit on the 31st of May, 1913, alleging that the estate was an impartible Raj, and that the alienations made by the Rani were invalid in law which neither he nor his late father

1916

BALNATH PRASAD SINGH v. TEJ BALI SINGH

agreed to ratify, whereupon in order to defeat his rights the Rani approached the defendants Nos. 1 and 2 and adopted the abovementioned devices. Pandit Banarsi Misir was also made a defendant.

In his defence the defendant No. 1 traversed all the main allegations of the plaintiff, pleading, *inter alia*, that the estate was neither a *raj* nor an impartible estate; that there had been several partitions before, that none of the customs set out in the plaint was ever in vogue; that the late Raja did not make any oral will; that the Rani had acquired an adverse title to the estate by her long possession; that at all events her possession was adverse to the right of the heir according to the rule of lineal primogeniture; that he was the heir to the estate under the Hindu law; that even according to the rule of ordinary primogeniture he was the nearest heir being the eldest male collateral nearest in blood, and that he was the heir to the Rani's *stridhan*.

The other defendants put in separate written statements

The previous history of the estate, which has a material bearing on the case, is set out fully in the judgements of the Court.

The court of first instance decreed the suit, holding, *inter alia*, that the estate was an impartible *raj*, that the family was joint and the succession was by rule of lineal primogeniture.

The defendants appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Dr. *Tej Bahadur Sapru*, Babu *Harendra Krishna Mukerji*, Babu *Ram Mohan Dey*, Babu *Lalit Mohan Banerji* and Munshi *Kanhaiya Lal*), for the appellants:—

Under the ordinary Hindu law the defendants succeed as nearer reversioners. Further, under the Privy Council rulings, the ordinary Hindu law would apply except so far as it had been modified by custom. The Hindu law recognized ordinary primogeniture as opposed to lineal primogeniture. The rule is to find out who would be the nearest heirs and then to select the eldest of them. If this rule be adopted, the defendants are to be preferred. The plaintiff must prove three

things, and if he fails in any of these three, his case falls to the ground :—

(*a*) that the estate is an impartible estate,

(*b*) that the succession is by rule of lineal primogeniture, and

(*c*) that there was a custom of widow's possession for life-time only, with a vested remainder to the nearest reversioner living at the time when the succession opened out to her.

The property was confiscated or conquered in 1744-45 and remained in the possession of the Benares family till 1781. The grant of 1781 was a personal grant to Adil Shah and not to the family. The family was not joint, otherwise the widow, Rani Bed Saran Kunwar, would not have succeeded. If the family was separate the doctrine of representation will not apply and the collateral nearer in degree will exclude the one who is more remote The plaintiff did not set up a case that the widow was in possession as a licensee. A widow cannot get a life interest in a joint family unless it is recognized by custom; *Raja Rup Singh* v. *Rani Baisni* (1). The grant is a re-grant of a confiscated or conquered property.

(The evidence bearing on this point was then referred to.)

It was to all intents and purposes a re-grant and was treated as such by the East India Company. The question is as to whether the character of impartibility can be attached and a custom of succession by the rule of lineal primogeniture created since the grant. By conquest or confiscation the old character was gone, this is absolutely a new estate granted to Adil Shah. The full and entire estate was lost in 1744-45 and did not come back till 1845 or thereabouts. The question is whether in law the old rules of primogeniture, etc., were revived Those customs were attached to the devolution of property and did therefore vanish with the loss of the estate. The property acquired by re-grant was self-acquired property of Adil Shah. There was not a single instance of succession by the rule of lineal primogeniture in this family. The application, dated the 17th of June, 1896, was not consistent with the theory of succession by the rule of lineal primogeniture.

(1) (1884) I. L. R., 7 All., 1.

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH

Special evidence will be required to establish the rule of lineal primogeniture; Mayne's Hindu Law and Usage, 8th Edition, paragraph 545 at page 767, [the evidence on this point was then referred to].

The Hunsapore case (1) does not stand in my way, as in that case there was no new *sanad* granted. The estate was restored in its entirety and the only change that was made was in the incumbent. It is not so in the present case. No subject can have any power to create a new rule of succession, *Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu* (2), *Raja Venkata Rao* v. *The Court of Wards* (3). *The Shivagunga* case (4) can be distinguished. It was for the British Government or the East India Company to put back the old rights. The question is have they done so? The custom is not quite a family custom, but is one relating to property and will go along with the property. In the present case it does not appear anywhere that the Government intended the custom, if there was any, to revive. In *Mallikarjuna* v. *Durga* (5) there was a clear intention to continue the old customs. The moment the family estate is lost entirely the peculiar incidents of the joint family are lost, and if one of the members thereof subsequently acquires it then it is his self-acquired property. In Oudh, after the confiscation in 1857, some properties were restored in 1859, and these were held to be self-acquired properties; *Brij Indar Bahadur* v. *Rance Janki Koer* (6), Mayne's Hindu Law and Usage, 8th Edition, page 154. The case of *Hurpurshad* v. *Sheo Dyal* (7) is distinguishable, as in that case there was a clear intention on the part of the grantee to treat the property as a joint family property. It is not so here. Moreover, Mouranawas not one of the confiscated estates, *Thakur Shere Bahadur Singh* v. *Thakurain Dariao Kuar* (8), the first *Shivagunga* case (9) *Venkatarayadu* v. *Venkataramayya* (10) *Venkata Appa Row* v. *Venkata Narasimha Appa Row* (11).

(1)-(1867) 12 Moo. I. A., 1.
(2) (1870) I. L. R., 1 Mad., 237 (245 to 247).
(3) (1873) I. L. R., 2 Mad., 120.
(4) (1881) I. L. R., 3 Mad., 250.
(5) (1889) I. L. R., 13 Mad., 405.
(6) (1877) 5 I. A., 1.
(7) (1876) I. R., 2 I. A., 259.
(8) (1877) I. L. R., 3 Calc., 645.
(9)-(1863) 9 Moo. I. A., 542 (609).
(10) (1891) I. L. R., 15 Mad., 284.
(11)-(1913) 41 I. A., 60.

It must be taken that whatever rights the family had had been swept away by the conquest by Balwant Singh. The grant to Adil Shah was therefore an ordinary Hindu's property. The plaintiff has to make out that it was an impartible, ancestral and joint estate that was granted to Adil Shah and Run Bahadur Shah. No custom can grow up in the course of three generations. The next point is whether or not at the date of Kesho Saran's death in 1871 the branch of Rachpal was joint with that of Adil Shah. That branch was separate all along, and therefore the recent Privy Council ruling known as the Telwa case will apply; *Tara Kumari* v. *Chaturbhuj Narayan Singh* (1). Rachpal's branch was separated when Bishrekhi was settled, with Rachpal at the instance of Adil Shah. Even in impartible estates the occupier of the *gaddi* is competent to make any alienations he likes; *Sartaj Kuari* v *Deoraj Kuari* (2), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (3). A junior member is therefore not a co-owner in the strictest sense. That is the view the Privy Council has taken in the Pittapur case. At the time of the death of Kesho Saran Shah, in 1871, no one set up any claim by right of primogeniture. The widow ought not to have got the estate if the family was joint, unless there was a custom, which has not been proved in this case. The plaintiff's father ought to have inherited them, but he did not, and this also shows that the family was separate. Adil Shah and his brothers were sole grantees of their respective properties and that is another light in which the matter can be looked at. His brothers got these properties when settlements were made with them. A person who gets property from the Crown gets it as a self-acquired property, the first *Shivagunga* case (4), the *Hunsapore* case (5) Adil Shah got only a life estate. A fresh grant was made to his adopted son. Full ownership was only recognized in or about 1845. We do not admit that the family was joint

(1) (1915) I L R., 42 Calc., 1179

(2) (1883) I L R., 10 All., 272 (283); L R., 15 I. A., 51

(3) (1909) I L R., 32 Mad., 383; L R., 26, I A., 83.

(4) (1863) 9 Moo. I A., 539

(5) (1867) 12 Moo I. A., 1.

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH.

before confiscation. If the family be joint, the then plaintiff will be the heir by the doctrine of representation. Adil Shah's father was alive when the grant was made to Adil Shah. At the time of the death of Kesho Saran the whole action of the members of Rachpal's branch, then existing, was on the assumption that the family was separate. Even in their application of 1896 they pass as reversioners. They never mentioned any custom then. The Bishrekhi taluqa was never a Babuana grant. A Babuana grant is never separate from the parent estate; *Babu Gunesh Dutt Singh* v. *Maharaja Moheshur Singh* (1), *Bachoo Harkisondas* v. *Mankorebai* (2), *Tara Kumari* v *Chaturbhuj Narayan Singh* (3).

[The evidence relating to the separation of Rachpal's branch was referred to.]

The *onus* lies on the plaintiff to explain why no attempt was made to get the property at the time of the death of Kesho Saran Shah. The widow could not succeed then. If the widow was in possession as a Hindu widow merely, then her possession was on behalf of the person entitled to the estate, as the widow represents the whole estate. If the family was separate then her possession was rightful so far as we are concerned but adverse against the plaintiff; *Sham Koer* v *Dah Koer* (4)

The Hon'ble Pandit *Moti Lal Nehru* (with him Mr. *Jawahar Lal Nehru*, Mr. *P R Dass*, Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad*) for the respondent :—

In the case of an impartible *raj* one member sits on the *gaddi* and the other members have only the rights of maintenance, and, when suitable circumstances arise, the successor is to be selected out of them. All the same these members as well as the occupant of the *gaddi* constitute a joint Hindu family. Everything outside this special arrangement about enjoyment and the customs obtaining in the family, is governed by the ordinary Hindu law. The *onus* will lie on those who assert separation. The presumption (if nothing is shown) is that the family is joint. The whole family is joint. In the case of an impartible estate the jointness continues : as the property is in its nature impartible there cannot be any separation. In order to constitute a

(1) (1855) 6 Moo. I. A., 164 (197). (3) (1915) I. L. R., 42 Calc., 1179.

(2) (1904) I. L. R., 29 Bom., 51 (57). (4) (1902) I. L. R., 29 Calc., 664.

partition there should be a separation in worship, estate and living. The Telwa case (1) was decided on the special evidence thereof. In that case a separate *Thakurbari* was started and a separate *tulshi* plant was planted, so there was a separation in worship. Periodical worship is the main element. Daily worship a man can perform anywhere. There was nothing like separation in periodical worship in the present case. Moreover, in that case there was an admission of separation, not so in the present case. The Aghori-Barhar estate is an ancient *raj*, the commencement being lost in hoary antiquity (which is a very particular test) and the possession having been all along in one man. If no separation is proved, then my case is proved. If it is once assumed or held that the restoration was to the whole family then the whole family was joint in estate. We have shown that certain taluqas were in the possession of certain *guzaradars* at the time of the dispossession by Balwant Singh and the descendants of those very persons come into possession of those very taluqas after restoration. The evidence bearing on this point was then referred to. Adil Shah was an *amil* and not a present day *tahsildar*. There was no confiscation by Balwant Singh. When Chet Singh was expelled everything, including the *guzara* villages, was restored to Adil Shah. He had to give back these villages to the *guzaradars*. For instance Mukarsam was sued for by one of the *guzaradars* in 1793 and the suit was decreed. It was a ruling principality in the beginning. After restoration and up to now the property was enjoyed as a joint family *raj*. As for the history of the family, I refer to—Sherring's Hindu Tribes and Castes, Volume IV, page 383, which is based upon Roberts' account of 1847, and on Elliot. Pollock in 1868 writes:—"the fort does bear the appearance of considerable antiquity, barring the Eastern rooms." Hamirpur District Gazetteer, page 167; Sherring Hindu Tribes and Castes, Volume IV, page 183 (Pedigree); Manual of Titles, page 106 (Pedigree,); Collection of papers relating to the Settlement of South Mirzapore, page 45 (Roberts), dated the 6th of January, 1847, but published in 1880. Balwant never aspired to sovereignty but acted as an *amil*.

(1) (1915) I. L. R. 42 Calc., 1159

1916

BALNATH PRASAD SINGH v. TEJ BALI SINGH.

Benares Gazetteer, page 198; Sherring, Volume, IV, page 45; Roberts, page 68, para. 116; Shakespeare, page 68. If Balwant Singh was a mere usurper then there was no confiscation. But if he had ejected Shambhu Shah on account of arrears and farmed out for a while then there was no forfeiture.

Balwant never had any sovereignty and never did profess to have any. There was never a *de jure* confiscation according to the present day notions. Reference was also made to Benares District Gazetteer page 202; Aitchison's treaties, dated the 21st of May, 1775, Volume I, page 97; Mirzapur Gazetteer, pages 234-37; Narrative of the Insurrection in Benares by Warren Hastings, Appendix III, part 1, No. 3A, page 34, dated the 21st of November, 1781; Roberts' Settlement of South Mirzapore, page 46, paras. 6, 7, 8 and 9; Pollock's Report (same book), page 26; Shakespeare's remarks (same book), page 88, paras 3 and 4; Crooke and Dampier's Notes on the tract of country south of River Son, page 75, para. 45. These authors skip over the changes between 1781 and 1803. Regulation XLII of 1795 refers to *mahikana* grants of Government revenue only. The family still got a reduction of Rs 8,001 out of the Government revenue. The zamindari rights were never questioned. The *mahikana* was quite separate from the zamindari. Even a personal grant can be a joint family property subsequently if so treated. There must be a complet confiscation and then a re-grant to a person of limited interest before old rights could be held to have been swept away. Nothing of the kind is shown by the evidence in this case. In 1782 possession was given to Adil Shah, but the settlement could not be made directly with him owing to the treaty with Mahip Narain Singh: Settlement of South Mirzapore, page 51. Mukarsam was really a *babuana* village. It was the *guzara* of Dutt Singh. A *guzara* is inconsistent with the family being separate. Dutt Singh's heirs sued for Mukarsam and got it. Adil Shah died in 1794. The *sanads* of 15th October and 25th November, 1794, confer the whole interest of Adil Shah on Ran Bahadur. So far as the zamindari was concerned, nothing happened to detract from its character from 1781 to Adil Shah's death in 1794. Rachpal

continued in possession of the *malikana* villages from 1794 to 1796. That was a mode of enjoying family property. I refer to Roberts, page 68, paras. 118-120. Even in the *malikana* allowance Rachpal was given a share. This is not at all inconsistent with jointness. From the pleadings set forth in the decree of the appellate court, dated the 14th of January, 1833, it appears that the allegation in the plaint of Ran Bahadur Shah that the taluqa Bishrekha was a maintenance grant was not traversed in the statement of Bisheshwar Bux Singh, son of Rachpal Singh.

Up to 1745, when Shambhu Shah was dispossessed, the estate was an impartible *raj* consisting of the main *raj* and the zamindaris of the Babus. There was no forfeiture. We do not know the nature of the possession taken by Balwant Singh. In 1775 the Province was ceded to the East India Company. Adil Shah was put in possession in 1782. The two branches of the case must be looked at separately, *viz*:—(*a*) the relation of Adil Shah and his family with Mahip Narain Singh or the East India Company, and (*b*) relation *inter se* between Adil Shah and his collaterals. In an impartible *raj* the *gaddi-nashin* has right to alienate his property (I. L. R., 10 All., 272) and a Babu who had laid by anything can invest the same in the property transferred by the *gaddi-nashin*. Hence the mortgage of Sarjan. The co-parcenership subsists only for finding out an heir. Taluqa Kon did not belong to the *raj* from before. The *malikana* grant was, *inter alia*, over this taluqa Kon. The putting in possession in 1782 of Adil Shah was found inconsistent with the treaty with Mahip Narain Singh. Hence no direct settlement was made then with Adil Shah. Regulation I of 1795—Section 5 is very important. Regulation II of 1795—Sections 6, 9, 11 (last para.), 12, 16 and 17 (clause 3). Section 17, clause 3, refers to this very family and it shows that the restoration was to the family. "Rajahs and Nawabs" by Mackintosh dated 1877, page 44. There can be no doubt that he never lost its rights (legally speaking) at any time barring the period of dispossession which was not a forfeiture. Shakespeare, page 88 (Roberts' Reports, para. 14, page 58). Orders passed by the Government in 1844-45, Robertson's Reports, 1873, page

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH

104, para. 2, and page 106 These show that it was not a new grant, but that the Raja had rights anterior to and independent of the *sanads*. Some of the Babus have left no heirs and their properties have reverted to the *raj; Kachi Kaliyana Rangappa Kalakka Thola Udayar* v. *Kachi Yuva Rangappa Kalakka Thola Udayar* (1). The rule is that unless there is a break of three degrees, the co-parcenership subsists. The Hindu law only takes into consideration the last person dying and not the original founder of the family. Mayne's Hindu Law and Usage, 8th Edition, pages 342, 346 (para. 273); *Sri Abhinava* v. *Ami Rangadani* (2). As regards the widow's succession Rani Bed Saran Kunwar set up an oral will. We too in our plaint do set up an oral will. Rani Jai Chand Kunwar in 1828 set up a custom of widow's succession. This custom was referred to in the will of Makururdhwaj Shah The evidence shows that the custom about widow's succession was referred to here. The evidence shows that the whole family was at least saturated with the belief as to the existence of a custom of widow's succession The life estate might be adverse *qua* life estate, but no more.

[Certain papers were then referred to.]

Separation *inter se* between the Babus will not cause their separation with the *raj*, *Darbhanga case* (3). Another *Darbhanga* case (4) is reported in 6 M. I. A., 164. Many impartible *rajes* have been carved out of the Darbhanga *raj*, which, big as it is now was even bigger still in the past. Different considerations will apply to different *babuanas*. That the revenue is payable by the Babus through the parent *raj* is a special incident of the Darbhanga *raj* and not a general feature of all impartible estates. Hence *Sartaj Kuari* v. *Deoraj Kuari* (5) is a special case. The Privy Council has introduced in the case of impartible estates a distinction as against ordinary joint family property, *viz.*, alienability. Hence in spite of this feature of alienability the property remains joint. A Babu can deal with such rights as he has in his *babuana* in any way he likes *Ram Chundra Marwari* v. *Mudeshwar Singh* (6). He can alienate his rights

(1) (1908) I. L. R., 28 Mad., 508 (572, 607).
(2) (1912) 23 M. L. J., 79.
(3) (1909) I. L. R., 36 Calc., 943.
(4) (1855) 6 Moo. I. A., 164.
(5) (1881) I. L. R., 10 All., 272
(6) (1905) I. L. R., 33 Calc., 1159.

subject to the contingent rights of the grantor or his successors. Ram Krishna's Hindu Law, Volume II, page 320.

Reference was made to *Durgadut Singh* v. *Rameshwar Singh* (1). Even in ordinary joint Hindu family a distinction is drawn between partition and separate enjoyment. A *raj* is an exception to the ordinary joint family property and, if once that is admitted, there is no confusion The root feature of a joint family (co-parcenership by birth) is wanting in a *raj*.

The decree of 1833 shows that Bishrekhi was a *babuana* grant. Bhup Narain's taluqa Kaurhia went back to the *raj* and that fact was inconsistent with the theory of separation. This taluqa is now included in our claim I refer to *Lalikeshwar* v. *Rameshwar* (2). The Privy Council has held that the mere fact that there had been a partition in the partible property did not cause separation *qua* the impartible property, *Chintamun Singh* v. *Nowlukho Konwari* (3), *Indar Sen Singh* v. *Harpal Singh* (4), *Sri Raja Lakkshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (5), *Raja Varlagadda Mallikarjuna Prasada Nayudu* v. *Raja Varlagadda Durga Prasada Nayudu* (6), 28 Madras Law Journal, 79, supports my contentions fully. I. L R, 42 Calcutta, 1179 (P. C.), must be taken with the special facts thereof. The test will always be whether the property taken is revertible or not. If it be revertible then the link subsists. We have the fact that Kaurhia has reverted. Bhup Narain got it at the same so-called distribution of property at which Rachpal got Bishrekhi *Guzara* grants in this family are partible according to evidence.

The Hon'ble Dr *Sundar Lal*, in reply :—

The history does not show that when the Chandels settled in these tracts the collaterals of their prince got any *babuana* grant from him. It was for the plaintiff to prove that the different taluqas were *babuana* grants About the middle of the 18th century Balwant Singh was a *de facto* ruler in this part of the country and he posed as an autocrat. The dispossession of the Chandels was a case of expulsion and conquest and not a mere

(1) (1909) I. L. R., 36 Calc., 943.
(2) (1909) I. L. R, 36 Calc., 461.
(3) (1875) I L R, 1 Calc., 153 (159)
(4) (1911) I L R., 34 All., 79.
(5) (1897) I. L. R., 20 Mad., 256 (264)
(6) (1900) I. L R., 24 Mad., 147 (153).

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH.

case of farming out. The grant was to Adil Shah alone and for life only and the old state of things was swept aside. Insurrection of Benares, by Hastings himself, page 84, appendix I. L. R., 10 All., 272, is an innovation started by the Privy Council and was not a recognized principle of law before. Up to the decision of the Pittapur case it was doubted in Madras.

RICHARDS, C.J.—This appeal relates to the right to possession of a very valuable estate in Mirzapur, referred to in the plaint as the Aghori-Barhar Raj. The last male owner was Raja Kesho Saran Shah. The Raja died on the 4th of March, 1871, leaving no issue, but a young Rani, Bed Saran Kunwari, him surviving. The Rani lived until 1913, when she died. A glance at the pedigree filed with the plaint will show that the plaintiff is the eldest son of Babu Jagannath Prasad. This gentleman survived the late Raja but died before the Rani on the 14th of October, 1910. Defendant No. 1, Babu Baijnath Prasad, is the rival claimant to the *raj*. He was a brother, next in seniority to Babu Jagannath Prasad aforesaid, father of the plaintiff. Defendant No. 2 is a younger brother of defendant No. 1. In the plaint it is alleged that the Rani had made or attempted to make large gifts at the expense of the estate to one Pandit Banarsi Misir, a Brahman, that she had tried to get the consent of the plaintiff's father to her action; that the plaintiff had intervened to prevent his father consenting, and that thereupon the Rani turned her attention to the rival claimant and his brother defendant No. 2, with whom she was more successful. That the Rani did make very extensive gifts to Banarsi is an admitted fact. Banarsi was made a defendant to the suits, though he is no party to the appeal. On the 4th of November, 1912, Rani Bed Saran executed a document purporting to be a codicil to a will executed by her on the 1st of March, 1910, whereby she had appointed the aforesaid Pandit Banarsi and others executors for the performance of her funeral ceremonies. The document recites that defendants 1 and 2 belong to the same *gotra* and will become owners of her husband's estate after her death. The lady then declares that these persons will be her successors:—"I direct that Babu Baijnath Prasad should occupy the *gaddi* of the estate and continue to maintain the other

members of the family in accordance with the old usage. These persons even came to me . . . and in proof of faithfulness and obedience they have to-day under a deed of relinquishment admitted my powers to make *waqf* and to manage the *waqf* property and to make transfers under deeds of gift and to make gift and religious gift of cash and articles, etc., which I the executrix have done out of the profits arising from the property of my husband". By a deed of even date defendants 1 and 2 completely ratified all that the Rani had done:—"It is a matter of great pleasure to us that the said Rani Saheba has used the said income for good and religious purposes which every Hindu widow is authorized to do . . . Pandit Bazarsi has been in the service of the said Rani since 1893. So far as we have come to know from inquiry as well as from the Rani and from our personal acquaintance we are fully satisfied that the Panditji is a very honest man". It is to be hoped that defendants 1 and 2 meant all they said and that the Panditji was entitled to the high testimonial given him. A perusal of the document discloses not only the piety of the deceased Rani but also of defendants 1 and 2. It is perhaps open to the criticism that the executants protest too much. And there is a marked contrast between this document and a complaint addressed to the Collector on the 17th of June, 1896, by the father of the plaintiff and the two defendants (see A407) in which they bitterly complained that the Rani is destroying and wasting the estate and has given Rs. 99,000 in cash besides other extravagant grants to the priest. It may well be doubted that defendants would have executed the deed of November 1912, if defendant No. 1 believed that he was entitled to succeed to the *gaddi* on the death of the Rani. On the 4th of November, 1912, the Rani executed a deed of relinquishment in favour of Baijnath Prasad, defendant No. 1, who was declared owner of the *gaddi*. By way of proof of consent Bishnath Prasad executed the document. Mutation of names followed and defendant No. 1 got possession. On one issue in the case, viz., whether the estate is an impartible *raj*, the fact that Baijnath Prasad took it as a *raj* with the assent of his brother is not without some significance. In the codicil, of which of course defendants 1 and 2 were cognizant, Baijnath Prasad was "to occupy the *gaddi* of the estate and

1916

BALGNATH PRASAD SINGH v. TEJ BALI SINGH. *Richards, C J*

continue to maintain the other members of the family in accordance with the old usage."

I now proceed as shortly as possible to deal with the history of the family. The accuracy of the pedigree filed with the plaint has (save in one respect) not been contested. According to the pedigree Raja Adil Shah was succeeded by Raja Ran Bahadur Shah, the son of Babu Bhup Narain, brother of Raja Adil Shah. It was conceded at the hearing that the evidence showed that Ran Bahadur was adopted by Adil Shah and the successor was the adopted son. The family is beyond all question a very ancient one. There has always been a Raja installed in the *gaddi* in the usual way and the members of the junior branches are styled "Babus," the appropriate name for junior members of a Raja's family. The history of the family is referred to in many works, including that of Mr. Sherring (vide Hindoo Tribes and Castes, Volume I, pages 182-183). "About the year 1744 A.D. Shambhu Shah, the then Raja of Aghori, was dispossessed of his domains by Raja Balwant Singh. During the insurrection of Chait Singh, Adil Shah, grandson of Shambhu Shah, just mentioned, attended on Warren Hastings and made himself so useful that the Governor General gave him a *sanad* restoring him to the zamindari of Aghori-Barhar. This was in October, 1781. A few days later (on 15th October, 1781), the Raja appears to have received a second *sanad* granting him an allowance of Rs. 8,001 in the form of an assignment of certain villages, and on this is based the right, which his descendant still enjoys, of holding free of revenue nearly the whole of Aghori pargana and certain villages in Barhar. On possession being taken of Kon by the Company the taluqa was one of the estates assigned to Adil as his *malikana*. It was managed till his death in 1794 by his brother Babu Rachpal. The latter then claimed to hold the taluqa, but on his death shortly afterwards (in 1796) Raja Ran Bahadur, the nephew and heir of Adil Shah, obtained possession. Aghori taluqa had a similar fiscal history. Both taluqas were in 1803 declared to be included in the jagir of the Raja." The above is taken from a Government publication called "A note on the tract of country south of the river Son by W. Crook, C. S., and G. R. Dampier, C. S."

To avoid confusion it is necessary to keep separate the history of the family property and the history of the *malikana* grant of Rs 8,001. The latter was undoubtedly originally a personal grant to Adil Shah for a temporary purpose. It is not quite accurate to say that "villages were assigned" as the equivalent of this grant It was the revenue of the villages, not the villages themselves, which was assigned, and some if not most of the villages were already part of the family estates. The *sanad* relating to the zamindari given by Warren Hastings on the 9th of October, 1781, was in the following terms:—

"Be it known to Adil Shah, respectable zamindar of pargana Aghori, that on a petition having been made, it is known that the zamindari in the pargana aforesaid is his old ancestral property. Several years ago Raja Balwant Singh forcibly dispossessed him and brought it to his use. Therefore in lieu of former rights he should remain in proprietary possession of his share as heretofore. He should make arrangements as regards the cultivation of the land and population of the pargana aforesaid in accordance with the directions of the Revenue officers and Raja Mahip Narain Bahadur of high rank. He is insisted on doing as directed above." According to Mr. Roberts' report Adil Shah recovered possession with the help of British soldiers in pursuance of this document. Warren Hastings, as already stated, also made a grant to Adil Shah of Rs. 8,001. It would appear that the origin of the grant of Rs. 8,001 was to compensate Adil Shah for not getting possession and actual enjoyment at once of the ancestral estate. The Raja, or perhaps I should say the family, is now in possession of the ancestral estate and they also enjoy the Rs. 8,001 *malikana* grant in perpetuity. The arrangement now is that they are charged with Government revenue on all the property including the property, the *jama* of which was assigned to meet the grant of Rs. 8,000, but they take credit for Rs 8,000. Warren Hastings had entered into a treaty or arrangement with the Maharaja of Benares and subsequently difficulties presented themselves as to how faith could be kept with both the Raja of Benares and the Raja of Aghori, having regard to the fact that in a sense the property had belonged to both. This led to a good deal of complication and prevented temporarily the *sanad* of Warren Hastings

1916

BALNATH PRASAD SINGH v. THE BALI SINGH.

Richards, C.J.

being completely acted upon. In the end matters were adjusted, and the family are now and have for many years been in undisturbed possession. In this connection Regulation I and II of 1795 should be read and in particular the preamble to Regulation I and clause XVII of Regulation II, sub-clause (3), in which Adil Shah is referred to as the "representative" of the Aghori Rajas. The conclusion I have arrived at is that from the time of Warren Hastings the family have been substantially in possession of the ancestral estate (they never in fact completely lost touch with it) and that, notwithstanding the various events that happened, the restoration of the property in justice and equity ought to be attributed to the *sanad* of the 9th of October, 1781, just as if the latter had been carried into full effect at the time. I have appended to my judgement a short statement of the events which have happened. The first question is whether the estate is impartible. This is a question which their Lordships of the Privy Council say is to be decided on the facts of each case. No doubt the Government in making a grant of an estate can determine the nature of the grant, but I do not think, in the absence of specific terms in the grant, surrounding circumstances can or ought to be ignored. I will give an example. Suppose Government confiscated what was admittedly joint family property and suppose (in consequence of representations made by a member of the family to the effect that the confiscation had been made by mistake or for insufficient reasons) the Government restored the property by making a fresh grant to the member without any special terms or conditions in the grant. I think that the property so restored would be joint Hindu property in the hands of the member of the family to whom the grant was made just as it would have been if there had been no confiscation. In the present case I think that the restoration of the property, notwithstanding what subsequently happened, must and ought to be referred to the action of Warren Hastings. If this view be correct, Regulation XLIV of 1795 (relied on by the defence) can have no application, because it refers to grants after 1797. It does not appear to me that Balwant Singh had lawful power to confiscate the estate, though the defence strongly contend that he had. Bearing in mind the terms of the document of 9th of October,

1916

BALNATH PRASAD SINGH v. TEJ BALI SINGH

Richards, C.J.

1781, bearing in mind the fact that four Rajas subsequently ascended the *gaddi* and bearing in mind the terms of the will of the Rani accepted by the defendant and his brother, I think that this estate must be deemed impartible: see *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar*(1).

We now come to another question Assuming that the estate is impartible, who is entitled to the *gaddi*? Defendant No. 1 says that the Raja is he that is found nearest in blood to the late Raja and senior in birth at the date of the death of the Rani and that he fulfils these conditions. The plaintiff contends that the property has always been joint. That the Rani got possession after the death of her husband not as succeeding to separate estate in default of heirs but by virtue of custom and that the Raja must be found in the senior line and that he as the eldest son of Babu Jagannath (brother of defendant No 1) should succeed It may here be pointed out that the common ancestor of both claimants is Babu Rachpal, brother of Raja Adil Shah. It is admitted at the Bar that if the property is to be deemed joint in the hands of Raja Adil Shah after restoration and if the estate was impartible and if there was no separation during the time of Adil Shah or subsequently, the contention of the plaintiff is correct. It is, however, contended on behalf of the defendant that even on the assumption that the property is impartible it was only joint in the sense that it would descend to the heir of Adil as an impartible *raj* and that upon his death, or the death of his Rani the heir would be he who was nearest in blood, and if more than one, he who was senior in birth. Leaving out of consideration for a moment the fact that Raja Shambhu was the occupant of the *gaddi* of an impartible *raj* when he was dispossessed and treating the property for the moment as ordinary Hindu joint property, I think that there is every reason for holding that the property would have been still joint on its restoration. There would be a presumption that Adil Shah, Babu Bhup Narain and Babu Rachpal (common ancestors of the plaintiff and defendant) were joint.

(1) (1905) I. L. R., 24 Mad., 562, affirmed by their Lordships in (1909), I. L. R, 28 Mad, 503.

1916

BALMACH PRASAD SINGH v. TEJ BALI SINGH

Richards, C.J.

Raja Shambhu was, however, on the *gaddi* of an impartible *raj*. This brings me to the consideration of the constitution of a Hindu family where there is an impartible *raj*. The normal constitution of a Hindu family is that of union. Wherein does a Hindu family with its senior member sitting on the *gaddi* differ from an ordinary Hindu family? What is the foundation of the difference? The answer seems to be this In the case of an impartible *raj*, the estate is enjoyed by the whole family through the occupant of the *gaddi* with all the prestige incident thereto, the right to maintenance exists, but the members of the family have no legal right to partition. The provision of maintenance to the "Babus" itself varies in different *rajes*. The "izzat" of Babus belonging to such a family is by no means insignificant. The foundation of the distinction is custom If this view be correct, the constitution of the family differs from an ordinary Hindu family so far as custom has modified it. The modification may no doubt be considerable and in a large *raj* like the present, very considerable. Authority in support of this view is not wanting. In the *Shivagunga* case (1) their Lordships of the Privy Council say:—"The zemindary is admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject. Hence if the zemindar, at the time of his death, and his nephews were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." The judgement in this case was delivered by TURNER, L. J.,

In *Doorga Persad Singh* v. *Doorga Konwari* (2), their Lordships say (at page 201 of the Report):—"The impartibility of property does not destroy its nature as joint family property or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to

(1) (1863) 9 Moo. I. A., 543 (593) (2) (1875) I. L. R., 4 Calc., 190

succeed to it upon his death in preference to those who would be his heirs if the property was separate. The rule upon this subject was stated in the *Shivagunga* case." Their Lordships then proceed to quote from the judgement in the *Shivagunga* case and say (at page 202) "the same rule was laid down by their Lordships in a case which was decided on the 12th of February, in the present year." Their Lordships then quote from the case of *Sivagnana Tevar* v. *Periasami* (1).

The same principle, it seems to me, was again laid down most emphatically in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (2).

In *Sartaj Kuari* v. *Deoraj Kuari* (3) the question was to the validity of certain alienations by the Raja in favour of his wife It was contended by the family that not even the Raja could break up the impartible estate (a view very generally held by the courts in India). Their Lordships held otherwise, and distinguished the previous decisions I have quoted. In the present case, however, no such distinction can be made because the question is not the power of the Raja to alienate, but where we are to find the successor to the *gaddi*. The circumstances of the present case are very similar to those in *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalyana Rangappa Kalakka Thola Udayar* (4) and the very question was raised.

I next proceed to consider the question of separation. An ordinary Hindu family separates :—

(1) When one or more members of the co-parcenary body assert his or their legal right to have the joint property partitioned, or

(2) They may agree to a partition.

It is the very essence of an impartible estate that there is no legal right to insist on partition, and it is somewhat difficult to understand how the members of a joint Hindu family in an impartible estate can agree to separate and the estate still remain impartible. If each member of the family, including the occupier of the *gaddi*, took his share of the estate it would almost seem as

(1) (1878) I. L. R., 1 Mad., 312.
(2) (1870) 13 Moo. I. A., 333.
(3) (1881) I. L. R., 10 All., 272.
(4) (1905) I. L. R., 24 Mad., 562; (1909) I. L. R., 28 Mad., 508.

1916

BALNATH PRASAD SINGH v. TEJ BALI SINGH.

Richards, C.J.

if the impartibility would cease with the partition. In *Tara Kumari* v. *Chaturbhuj Narayan Singh* (1) their Lordships held that there had been separation, but their Lordships do not appear to have held that the estate remained impartible after separation. In this case their Lordships decided the question of separation as a question of fact not of law. I will, however, assume that there can be such a separation. The question I conceive is one of fact. "A fact is said to be proved when after considering the matters before it the court believes it to exist, or considers it so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists." (Section 3, Indian Evidence Act). The question is did Adil Shah and his brothers separate or did the family subsequently separate? In my opinion there could have been no separation unless there was an intention to separate. Such intention could be proved by direct evidence or might be inferred from facts. There is no direct evidence. In a large impartible *raj* specific property is generally given to the junior members for their maintenance. In an impartible *raj* it would be practically impossible to manage otherwise. Sometimes this property is transferred by written instruments expressly for maintenance with the express condition that it should not be alienated. Sometimes the property is given in a much less definite way and there is always a tendency for the junior branches to treat the property as their own, to mortgage it and even to sell it. Their Lordships of the Privy Council do not appear to have considered it inconsistent with the impartibility of the *raj* that the Babus should have the power of alienating the property assigned to them. Once their Lordships decided [as they did in *Sartaj Kuari* v. *Deoraj Kuari* (2)] that the Raja could himself alienate, it followed that the Babus could do the same unless the grants to them were limited. In this *raj* sixteen taluqas have been assigned for the maintenance of the Babus. There is in the present case evidence that the descendants of Babu Radhpal partitioned between them the property they held. Assuming that they had a legal right to do this, I think it is by no means conclusive on the question as to whether the *raj* had ceased to be joint for the purpose of

(1) (1915) I. L. R., 42 Calc., 1179 (2) (1881) I. L. R., 10 All., 272.

ascertaining who has now the right to sit on the *gaddi*. The talnqa associated with the *gaddi* has never been partitioned. And the grants to the brothers of Adil Shah were in substance, though p.rhaps not in form, made by Adil Shah . see *Bachoo Harkisondas* v. *Mankoreba* (1). There is another fact relied on, namely, that Rani Bed Saran succeeded to her husband in 1871. It was (in the absence of custom) somewhat inconsistent with Raja Kesho Saran being joint with Babu Bindeswari Prasad, Babu Jagannath, Babu Baijnath and Babu Bishnath that the Rani should have succeeded. The Rani in a petition against the estate being taken over by the Court of Wards claimed to be the heir and alleged that her husband had given her authority to adopt a son. If the Raja had really made an oral will (which was not improbable) giving the Rani direction to take over the estate and adopt a son, it would explain why she was allowed to remain in possession, or her possession could be explained on the basis of custom, and there is evidence of such a custom. It is pleaded in the present case that the Rani succeeded on the basis of custom. In the case of *Raja Rup Singh* v. *Rani Baisni* (2), the question was whether the Rani was entitled by custom to the estate for her life. The case was decided by the High Court in 1880 Part of the evidence by which it was sought to prove that there was such a custom, was the fact that this very Rani Bed Saran had so succeeded to the *gaddi* of Aghori. It is quite possible if in 1871 the question had arisen whether there was a family custom and the Rani was claiming the estate on the basis of custom that she might have failed to discharge the *onus* just as the other Rani failed in the case reported in I. L. R., 7 All., page 1. In considering whether there is such a custom, the fact that the family allowed the Rani to succeed should not be left out of consideration with the rest of the evidence on the point such as it is.

[His Lordship dealt with facts and circumstances which in his opinion proved that the family never separated or intended to separate and the property was not the self-acquired property of Adil Shah. He also held that Jagannath Singh was the preferential heir.]

(1) (1904) I. L. R., 29 Bom., 51 (57). (2) (1884) I. L. R., 7 All., 1.

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH.

Richards, C.J.

One more contention was put forward on behalf of the defence. It was argued that if the property was joint Rani Bed Saran had no right to possession and that if she had none the suit is barred by limitation. I have already pointed out that the Rani's possession could be legally explained on the basis of a will by her husband or on the basis of custom. I do not think under the circumstances the Rani's possession could be said to be adverse.

No argument was, nor do I think any argument could have been, addressed to us on the 21st ground of the memorandum of appeal.

It is not alleged in the memorandum of appeal that any distinction could be drawn between the property and the grant of Rs. 8,000. I do not think that any such distinction could have been made. The grant of Rs. 8,000 has been always enjoyed (save to the extent of Rs. 900 per annum) by the Raja and has been treated as part of the *raj*. No argument was addressed to us on the matter.

[His Lordship appended to his judgement a history of this grant and a supplementary statement as to the history of Rs. 900 part of Rs. 8,001.]

MUHAMMAD RAFIQ, J.—I am of the same opinion as the learned Chief Justice and I give some of the reasons which have made me come to a finding adverse to the appellant. The dispute between the parties to this appeal relates to an ancient estate which at one time was a principality. The estate is known as Agori-Barhar and is situate to the south of the river 'Son' in the district of Mirzapur. [His Lordship then recounted the history of the family up to the death of Raja Kesho Saran who died leaving him surviving a widow but no issue.] Among the collaterals alive at the time of his death the nearest by blood relationship was Babu Bindeshwari Prasad Singh and next to him in degree were the three sons of his elder brother, *viz.*, Jagannath Prasad, Baijnath Prasad and Bishan Nath Prasad.

Bindeshri Prasad and Jagannath Prasad died in the life-time of the Rani. One of the sons of Jagannath Prasad, *viz.*, Babu Tej Bali Singh, is the plaintiff in the present case, and the two brothers of Jagannath Prasad are the defendants, as also the sons of one of the two brothers. Bindeshri Prasad, it seems, took

an objection to Rani Bed Saran Kunwar getting possession of the estate and claimed it for himself, but his objection was disallowed, vide Exhibit B12, page 80A. of the Paper Book. She, however, entered into possession and held the estate till her death in March, 1913. During her life she gave considerable property to a Pandit of Benares called Banarsi Misir by lease, endowment and purchase in his name. On the 24th of May, 1909, she executed a will and appointed some persons as her executors and gave them her *Stridhan*, i e, her personal property. On the 1st of March, 1910, she made a codicil in which she specified the property that was to go to one of the executors. On the 12th of January, 1912, she executed a further codicil by which she declared that Baijnath Prasad Singh and Bishnath Prasad Singh (defendants 1 and 2) were heirs to her late husband and that Baijnath should succeed to the *gaddi*. On the 1st of October, 1912, she executed a lease of 67 villages in favour of defendants 3 and 4. On the 4th of November, 1912, she executed a deed of relinquishment in favour of the first defendant of her rights in the estate. On her death in March, 1913, on a dispute between the plaintiff and the defendant No. 1 as to the possession of the estate the District Magistrate declared the latter to be in possession and directed the plaintiff to seek his remedy in a civil court. Thereupon on the 2nd of June, 1913, the suit out of which this appeal has arisen was brought by the plaintiff for a declaration of his title to and the possession of the *raj* of Aghori-Barhar The plaint, after reciting the old history of the estate, goes on to say that the *raj* is impartible and that the succession to it is governed by the rule of lineal primogeniture according to the custom of the family The younger members of the family are entitled to maintenance, and in case of the death of a Raja without issue, his senior widow, under a custom obtaining in the family, is entitled to hold the estate for her life, subject to the vested interest of the eldest member of the senior branch living at the time of the death of the last Raja to succeed after the widow. On the death of Raja Kesho Saran Shah in 1871, Babu Jagannath Prasad Singh, father of the plaintiff, became entitled to the *raj* subject to the life estate of Rani Bed Saran Kunwar. In fact the late Raja on his death-bed, in conformity to the family custom, directed that his widow should hold the estate for her life and

1916

BALINATH PRASAD SINGH v. TEJ BALI SINGH.

Muhammad Rafiq, J.

that after her death Jagannath Prasad should succeed to the *raj*. The latter was accordingly recognized as *Yuvaraj i.e.*, the heir apparent. He died on the 14th of November, 1910, and the plaintiff, his eldest son, became entitled to the *raj* subject to the life estate of Rani Bed Saran Kunwar. She wanted plaintiff and his father to consent to the gifts and other alienations she had made to and in favour of Banarsi Misir, and even offered to relinquish the *raj* in their favour, but they refused. She then approached the defendant No. 1 and got his consent to the benefits conferred by her on Banarsi Misir and in consideration of the compliance of the defendant No. 1 with her wishes, she first made a will and then executed a deed of relinquishment in his favour and a lease of 67 villages in favour of his sons. She had no right to make any of the transfers mentioned above nor could she dispose of the estate by will or deed of relinquishment. The plaintiff therefore sued to recover possession of the *raj* as also the property conveyed to Banarsi Misir by a declaration of his title as the lawful successor to Kesho Saran Singh by the rule of lineal primogeniture and by a declaration of the invalidity of the will of the 13th of January, 1912, the deed of relinquishment of the 4th of November, 1912, the lease of the 1st of October, 1912, and the alienation made in favour of Banarsi Misir. I need not refer to the defence of Banarsi Misir as the claim against him has been dismissed and no appeal has been preferred. Defendant No. 2 defended the suit on the ground that no cause of action was disclosed in the plaint against him and that he was not in possession of the estate. He asked for his costs. Defendants 3 and 4, the sons of defendant 1, set up the validity of the lease on the ground that it reserved a fair rent. The chief defendant who contested the suit was defendant 1. He denied that the *raj* was impartible or that the rule of succession by family custom or under the law governing the family was lineal primogeniture or that there was a family custom under which the senior widow of the last male-holder in case he died without leaving any issue got a life estate. He said that the estate was partible and had been divided prior and subsequent to 1745, and that whatever may have been its character prior to 1745, it was granted to Adil Shah for life and again to Rao Bahadur Shah by the East India Company as an ordinary zamindari.

It was divided in Adil Shah's life-time between him and his brothers and again among the two sons of Ran Bahadur Shah. In any case the grants to Adil Shah and Ran Bahadur Shah would make the estate the self-acquired property of each in turn, in which case, whether the grant was of partible or impartible estate, the estate would under the Hindu law go to the nearest *sapinda* of Raja Kesho Saran, *i.e.*, to defendant 1. Moreover, Rani Bed Saran Kunwar was in adverse possession for more than twelve years and hence defendant 1 would succeed to the estate both under the deed from her and as the nearest *sapinda* of her late husband. I would observe here that no separate defence was set up as to the *malikana*.

The learned Judge of the lower court found on all the issues raised in the pleadings of defendants 1 to 9 against them and decreed the claim. They have in their appeal to this Court reiterated the pleas taken in their written statement in the lower court.

The main question in the appeal is who is the lawful successor of Kesho Saran, the last Raja? The reply to the question depends upon the decision of four matters, *viz.*—

(1) The character of the estate.

(2) The nature of the grant to Adil Shah and again to Ran Bahadur Shah.

(3) The status of the family at the time of the grant to Adil Shah and subsequently.

(4) Nature of Rani Bed Saran Kunwar's possession.

It is contended on behalf of the appellants that the estate was not impartible prior to 1745 nor was it granted to Adil Shah or Ran Bahadur as an impartible estate. The grant to Adil Shah was of *mokarrari* lease and to Ran Bahadur of an ordinary zamindari. The character of the estate prior to the grant to Adil Shah is only relevant to show the nature of the grant to him as in the *sanad* and other official documents it is stated that he is restored to his former rights and also to show the natural desire of Adil Shah and his descendants to retain and keep up the dignity of a *raj*. The official and other historical accounts of the district of Mirzapur agree in stating that the estate of Agiori-Barhar was a principality up to the time of Raja Shambhu Shah, the

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH

Muhammad Rafiq, J.

grandfather of Adil Shah. The fact that the Chandel rajas of Aghori-Barhar were descended from the Chandel rajas of Mahoba would make the former adhere to the ancient custom of retaining the dignity of a *raj* in the family. But it is argued for the appellants that the estate was divided several times prior to 1745. The instances relied upon are the division of the estate between the two Chandel princes who usurped the *raj* on the death of Raja Maddan, the Kharwar chieftain, the partition of the estate by Oran Deo in his life-time between his two sons and subsequent assignment of small talukas to different members of the family, as is evidenced by the pedigree filed by the plaintiff respondent. The pedigree is admitted by the appellants, with the exception of the remark against the names of the junior members of the family as "*guzaradars.*" It is said that they were not "*guzaradars*" but got the talukas on separation. The division by the two Chandel princes on the usurpation of the estate cannot be said to have been a partition under the Hindu law. They had usurped the *raj* and had divided it among themselves each holding a separate *raj*. Nor can the division of the estate by Oran Deo among his two sons be said to prove the partibility of the estate in suit. Each of the estates created by Oran Deo as a matter of fact became a separate *raj* and has descended as such. The so-called subsequent divisions were not based on partition at all. The younger members of the family were granted villages as maintenance allowance from time to time; *vide* Mirzapur Gazetteer and the report of the tahsildar, in 1868, respondent's Paper Book p. 73, and Sherring's Hindu Castes and Tribes, p. 303. There is no evidence on behalf of the defendants appellants to show that the accounts given in the Gazetteer, or Sherring's book or the report of the tahsildar are incorrect. I am therefore of opinion that the estate in question was held as an impartable *raj* up to the time of the expulsion of Raja Shambhu Shah by Raja Balwant Singh of Benares in 1744-1745.

The next point for consideration is what was the nature of the estate granted to Adil Shah? Was he granted an ordinary zamindari and was the grant personal to him so as to make the estate his self-acquired property? The language of the *sanad*

of the 9th of October, 1781, shows that Adil Shah was given the same estate as was held by his grandfather Shambhu Shah.

[His Lordship after discussing the terms of the grant and other circumstance of the family proceeded]

The whole history of the estate from 1781 to 1845 to be found in the Government records and correspondence militates against the contention of the appellants that the grant to Adil Shah or Ran Bahadur was personal and therefore the estate conferred on them was their self-acquired property.

For the appellants reference has been made to the following cases.—*Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu* (1), *Venkatarayadu* v. *Venkataramayya* (2), *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (3), *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (4).

None of these cases in my opinion lays down that a fresh grant in all circumstances renders the property of the grantee his self-acquired property.

The first case related to the zamindari of Merangi in Madras. The contention was that the zamindari was impartible prior to its incorporation in another zamindari and its grant by the British Government did not render it partible. It was held that, even if the zamindari was impartible prior to its inclusion in the Vizanagram zamindari, the subsequent dealings with the (Merangi) zamindari, the nature and the terms of the grants under which it was held after 1802 and other evidence showed that it was now partible. In the present case the terms of the *sanads* of the 9th of October, 1781, and of 1794, their official interpretation soon after and the dealings with the estate by Adil Shah and Ran Bahadur Shah show that the grant was not personal and that the estate in their hands did not become their self-acquired property. In the second case, the one reported in I. L. R., 15 Madras, page 284, it was held on the evidence and the circumstances of the case that the grant by the Government to Venkata Narasiah was not a grant to the undivided family of which he was a member but to him personally. The third case, that of Venkata Row, was also decided on the

(1) (1891) I. L. R., 14 Mad, 237.
(2) (1891) I. L. R., 15 Mad., 284.
(3) (1918) L. R., 45 I. A., 51.
(4) (1877) L. R., 5 I. A., 1.

1916

BAIJNATH PRASAD SINGH v. TEJ BALI SINGH

Muhammad Rafiq, J.

facts proved in it and the construction of a *sanad* granted under Regulation XXV. It in no way helps the appellants.

The last case, that of Brij Ifdar Bahadur was also decided with reference to the language of the *sanad* granted to Kablas Koer, mother of Janki Koer and the facts and circumstances which led to the grant of the *sanad*. Moreover, the provisions of Act I of 1861 (Local Law applicable to Oudh) were also considered as affecting the rights of the parties. The decision of that case has no bearing on the present case. All that can be said on the authorities relied upon for the appellants is that each case should be decided on its facts and circumstances. The intention of the grantor, the language of the grant, the surrounding circumstances and the dealings with the estate have to be considered in determining the nature of the grant. In the present case all these considerations negative the contention of the defendants appellants. Another argument which has been urged with great force is that, had the estate not been the self-acquired property of Adil Shah, the widow of the last Raja would not have been allowed to succeed to her husband. I shall discuss the question of her succession presently, but, even if her succession is inexplicable on any other ground, that fact alone would not, in the face of other evidence, prove conclusively that the property in suit was the self-acquired property of Adil Shah.

The next point to be discussed is the status of the family. The defendants appellants say that there is no evidence that the estate was joint at the time of Shambhu Shah or that Adil Shah was joint with his brothers. In fact, they say, that the circumstances disclosed by evidence go to show that the family was neither joint before the confiscation of the estate in 1744-1745, nor at the time of restoration in 1781 nor afterwards. Prior to the confiscation, during the time of Shambhu Shah, other members of the family, his own brothers included, were living separately and had separate taluqas in their possession over which they had disposing power and which were divisible and were divided among their descendants. After the restoration, Adil Shah gave his two brothers, Bhup Naram and Rachpal, separate taluqas who lived on their estates. Adil Shah mortgaged some of his property to Rachpal. He also gave the latter Rs. 900 per annum out

of the *malikana*, which is still enjoyed by the family of Rachpal. The holders of the said taluqas cannot be said to be "*guzaradars*". A "*guzara*" is not alienable and a *guzaradar* must pay his revenue to the parent estate and not directly to the Government. Besides, if the family were joint, plaintiff's father should have claimed the succession on the death of Kesho Saran. In his application to the Government officers on the death of Kesho Saran plaintiff's father made no allegation of joint family and his right to succeed. It will be apparent from the argument for the appellants that the contention is based on the character of the '*guzaras*' in the estate in suit, the mortgage by Adil Shah to Rachpal, the succession of Rani Bed Saran Kunwar and the silence of plaintiff's father and his omission to press his claim as the next successor. The fact that the *guzaradars* of Aghori-Barhar have disposing power over their '*guzaras*,' or that the *guzara* villages are divisible and are divided among their descendants, or that the '*guzaradars*' pay revenue directly to the Government, does not change the character of their tenure or prove that they have separated from the family. A '*guzara*' is held on the terms it is granted, or the custom of the family. In the family of the parties to this appeal it appears that the '*guzaradars*' have the power of disposition and division and pay revenue direct to the Government. These incidents of the *guzara* are due either to the custom of the family, as deposed to by witnesses for the plaintiff, or considerations of convenience. The mortgage by Adil Shah to Rachpal would not necessarily show that the two were separated. Adil Shah, as owner of an impartible estate, could dispose of it as he liked. If he could transfer it what did it matter to him to whom he mortgaged a part of it. The succession of Rani Bed Saran Kunwar and the silence of plaintiff's father are, no doubt, circumstances which require consideration, and I shall refer to them when dealing with the possession of Rani Bed Saran Kunwar. They are, however, by themselves not sufficient to prove that Adil Shah was separated from his brothers. As against the considerations advanced on behalf of the defendants appellants we have to take into account some other facts which militate against the theory of partition. First is the presumption of Hindu law in favour of jointness and especially in the case of brothers. Then we have

1916

BALNATH PRAGAD SINGH v. TEJ BALI SINGH.

Muhammad Rafiq, J.

the fact of the reversion to the parent estate of four of the Babuana taluqas on the extinction of the lines of four *guzaradars*. The said four talukas were Kharawan, Kolwa or Rajpur, Tendhua and Bhanawat. Again, on the death of Bhup Narain, the second brother of Adil Shah, his taluqa, if the family was separate, ought to have been divided between Ran Bahadur and Rachpal, for Ran Bahadur had been adopted by Adil Shah and could not claim the whole taluqa as the son of his natural father. But Bhup Narain's taluqa reverted to the *raj*. In his plaint in 1822, Ran Bahadur distinctly stated that Rachpal was given the taluqa of Bishrekhi, now called Jamgaon, as maintenance. The descendants of Rachpal made the same allegation and the court found it to be true. Had the family been separate, Rachpal's descendants, the ancestors of defendant 1, would have pleaded that Bishrekhi was obtained on partition. In the litigation of 1793 relating to the taluqa of Mukarsam Khas neither party pleaded that Babu Deo Dat had got the taluqa by partition. *The common case was that he had got it for maintenance.* The learned advocate for the appellants relies on the case of *Tara Kumari* v. *Chaturbhuj Narayan Singh*(1) in support of his contention that when some portion of the estate is given to a member of the family who goes away and takes up his residence in another house separate from that of the Raja that amounts to separation. In the present case Rachpal and his descendants have lived in Bishrekhi and therefore he says they have been separate from Adil Shah and his descendants. I think that the case of *Tara Kumari* was decided on its particular facts and lays down no general principle. In a large estate and a numerous family it is the rule rather than the exception that the junior members of the family are given villages for their maintenance where they go and live for convenience and management. I find that the family was not separate either before or after Adil Shah got the estate.

The fourth point for consideration is the nature of the possession of Rani Bed Saran Kunwar. The case for the plaintiff is that under a custom obtaining in the family the senior widow of the last male-holder, in case of his leaving no issue, gets a life estate of a Hindu widow and Rani Bed Saran

(1) (1915) I. L. R., 42 Calc., 1179.

Kunwar succeeded as such Oral evidence has been given on behalf of the plaintiff in support of the alleged custom. The defendants appellants object to it and I think there is force in their objection that the said evidence is not sufficient in law to prove the custom set up. There are no valid instances given or proved But it appears to me that the silence of the defendants 1 and 2 and of the father of the plaintiff and the absence of any objection on their behalf to Rani Bed Saran Kunwar taking possession of the estate are explicable either on the existence of the alleged custom or their belief in the existence of such a custom or their respect for the wishes of Raja Kesho Saran, as stated in the plaint and by the Rani in several of her documents, or the desire to maintain the rank and position of the Rani as the widow of the head of the family.

As to the belief of the family in the existence of the custom in question, in addition to the conduct of the defendants 1 and 2 and plaintiff's father, we have the evidence of the Rajas of Basti and Gidour who were connected with the family of Aghori-Barbar and who swear to the custom The belief does not seem to be of recent growth. It was entertained as long ago as 1823 Rani Jai Chand Kunwar, the widow of Raja Makardhuj Shah, in her application of the 18th of August, 1828, refers to the custom in question. But apart from custom or the belief in it the oral will of Raja Kesho Saran, alleged by Rani Bed Saran Kunwar on more than one occasion and admitted by the plaintiff in his plaint and deposed to by some of his witnesses, would give the Rani the right to hold the estate for her life. I think that the weight of evidence is in favour of the oral will of Raja Kesho Saran Shah whose wishes were respected by plaintiff's father and defendants 1 and 2 giving the estate to his Rani for her life. I do not at the same time believe the story of the plaintiff that the Raja on his death-bed nominated plaintiff's father as '*Yuvaraj*.' The possession of Rani Bed Saran Kunwar was not therefore adverse. Moreover, if it be said that the alleged oral will of Kesho Saran is not proved and that the Rani held the estate without any right we have to see whether she became the absolute proprietor of the estate and thus the claim of the plaintiff is not sustainable. She admittedly held the estate as a Hindu widow. She says so in her will, her deed of

1916

BALDAI JI PRASAD SINGH v. TEJ BALI SINGH

Muhammad Rafiq, J

relinquishment, her petitions to Government and the Government officials, and the defendants 1 and 2 treated her as such. Her possession as a Hindu widow does not make her absolute proprietor of the estate. Had the plaintiff or his father sought to eject her after she had been in possession for 12 years, he would have failed as she could claim to remain in possession as a Hindu widow for her life. It cannot, therefore, be said that because she admittedly held the estate as a Hindu widow the rule of succession to the estate has been altered by that fact. Had she been in possession as an absolute owner, then no doubt the rule of succession would have been affected. The only result of her possession as a Hindu widow has been to interpose the period of her life between the death of her husband and the succession to the collateral entitled to succeed. Now that the four points, on the decision of which, as I have said in the earlier part of this judgement, depends the reply to the main question raised in the appeal, have been determined—what is the answer—who is entitled to the estate? My answer is—the plaintiff. It has been held that the rules of succession which govern the devolution of a partible estate apply to an impartible one also, "with such qualifications only as flow from the impartible character of the subject." This was first laid down by their Lordships of the Privy Council in the *Shivagunga* case and has been followed since—vide *Katama Natchiar* v. *The Raja of Shivagunga* (1). The principal qualification imposed by the impartible character of an estate is that a single person from amongst the heirs should succeed and hold the estate, that is, the succession is governed by the rule of primogeniture though not necessarily lineal primogeniture. The choice of the single heir depends on several considerations—whether the succession is governed by the *Mitakshara* or some other system of Hindu law; whether the estate was self-acquired or ancestral, and whether the family was joint or separate. In the present case the parties are admittedly subject to the *Mitakshara*, and I have held that the estate in the hands of Adil Shah was impartible and ancestral and not divisible and self-acquired and that he was joint with his brothers. In view of my findings on the character of the property and the grant to Adil Shah and the status of the family

(1) (1863) 9 Moo. I. A., 543.

and the fact that the parties are subject to the law of the *Mitakshara*—the choice must fall on the nearest co-parcener of the senior line—in the absence of any special family custom of descent. The rule of succession in such a case as the present was first enunciated in the case of *Naraganti Achamnagaru* v. *Venkatachalapati Nayanivaru* (1). It was laid down in that case that "when impartible property passes by survivorship from one line to another it devolves not necessarily on the co-parcener nearest in blood but on the nearest co-parcener of the senior line." This principle was adopted in subsequent cases and was approved of by their Lordships of the Privy Council in the case of *Kuchi Kaliyana Rangappa Thola Udayar* v. *Kuchi Yuva Rangappa Thola Udayar* (2). In the present case the plaintiff is the nearest co-parcener of the senior line, while defendant 1 is the co-parcener nearest in blood. The plaintiff therefore has the preference over defendants 1 and 2, and I hold accordingly.

I should also mention that the plaintiff in his plaint had stated that under a family custom the succession to the estate was governed by the rule of lineal primogeniture. He gave evidence in support of his allegation. If the right of the plaintiff to succeed depended on the alleged custom, I would have felt considerable hesitation, in view of the evidence in the case, in holding that he had proved his allegation of custom. In fact the question was not approached from that point of view by either side in argument. Each party claimed to be entitled to the estate under the law, resting his claim on the character of the estate, the nature of the grant, the status of the family and the character of Rani Bed Saran's possession. I would also like to note that the learned counsel for the defendants appellants frankly admitted during the course of his argument that if the estate is held to be impartible and in the hands of Adil Shah to be both impartible and ancestral and the family joint, the plaintiff must succeed. One other point remains to be considered, viz., the objection of the defendants appellants to the decree of the lower court with regard to the movables. No list of movables was given in the plaint and no evidence was produced to prove any in the possession of the defendants appellants. The learned Judge of the lower court has

(1) (1881) I. L. R., 4 Mad., 250. (2) (1909) I. L. R., 28 Mad., 508

1916

BALNATH PRASAD SINGH v. TEJ BALI SINGH.

Muhammad Rafiq, J.

directed that the defendants appellants should make a discovery of the movables and give an account The direction by the learned Judge is obviously erroneous In my opinion the decree as to the movables is bad in law and must be set aside.

Before concluding my judgement I would like to say a few words about the claim to the *malikana*. I have already mentioned, when reciting the pleas of the parties, that no separate defence was set up with regard to the *malikana*. In the grounds of appeal to this Court no objection is taken especially with regard to the decree of the lower court about the *malikana*. But I do not wish to rest my decision on the omission of the defence, for it might be said on their behalf that if the argument of a personal grant to Adil Shah or Ran Bahadur does not apply with regard to the estate, it does certainly apply to the *malikana*. The reason of the grant of the *malikana* and its subsequent history have been given by me in the earlier part of this judgement The *malikana* was no doubt personal to Adil Shah, and the whole of it would have been resumed but for the guarantee given by the Resident to the creditor of Adil Shah. The re-grant to Ran Bahadur was made on his representation that his estate had been over-assessed and he was getting into financial difficulties frequently. His representation may have been right or wrong, but it was in the belief that his estate had been over-assessed that the grant was made, and not only for his life but permanently. It therefore follows that the grant of *malikana* was made to enable the holder of the estate to pay his revenue punctually and to maintain the position and dignity of his rank. The *malikana* must therefore go with the estate. I would therefore dismiss the appeal and uphold the decree of the lower court, but with this modification that the decree with regard to the movables should be limited to the list given by the defendant 1 in his written statement at pages 29 and 30 of the Paper Book.

BY THE COURT.—The order of the Court is that the decree of the Court below is set aside with regard to movable property save to the extent of the movable properties mentioned at pages 29 and 30 of the Paper Book In all other respects the appeal is dismissed with costs.

Decree modified.

PRIVY COUNCIL.

SADIK HUSAIN KHAN (PLAINTIFF) *v.* HASHIM ALI KHAN* AND OTHERS (DEFENDANTS) AND SADIK HUSAIN KHAN (DEFENDANT) *v.* HASHIM ALI KHAN AND ANOTHER (PLAINTIFFS).

P C
1916
May, 11,12, 15,16,18,19. *July*, 11.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Muhammadan Law—Gift—Gift by deed of trust—Act No XVIII of 1870 (Oudh Laws Act), section 3—Meaning of "gifts"—Delivery and acceptance of subject of gift not proved—Act No IV of 1882 (Transfer of Property Act)—Act No II of 1882 (Indian Trusts Act)—Act No. XVII of 1876 (Oudh Land Revenue Act), section 61 et seqq.—Legitimacy, proof of—Acknowledgement—Endorsement by Judge of documents admitted in evidence—Civil Procedure Codes 1877 and 1882, section 141, 1903, order XIII, rule 4—Undue prolongation of litigation—Cross-examination of witnesses.

In section 3 of the Oudh Laws Act (XVIII of 1876), which indicates the cases in which among Muhammadans, the Muhammadan Law is to be applied, the word "gifts" includes a gift made to a beneficiary through a trustee.

A Muhammadan made a settlement, the parties to which were himself of the first part, his wife of the second part, and his wife and her father of the third part (the trustees), which, after reciting that Rs 85,000 was due by the settlor to his wife for the balance of her dower, and that it had been agreed between the parties that the settlement should be in full satisfaction of the dower debt, witnessed that for the consideration stated the settlor granted certain properties to the trustees upon trust to pay the net incomes of the properties to his wife for her life and after her death upon trust for all the children of the settlor and his wife "living at the time of his decease". The deed was never executed by the wife, and there was no evidence, independent of the deed, to show that any agreement was ever entered into between the settlor and his wife that she would accept the provision made for her in the settlement in satisfaction and discharge of the unpaid balance of her dower, and she never elected in his life-time to take the benefits conferred on her by the deed in lieu of it.

Held that the conveyance to the trustees was a purely voluntary gift, and was void by Muhammadan law unless accompanied by a delivery of possession such as the subject of the gift was susceptible of. Subsequent election could not be held to be a substitute for the original consideration.

Chaudhri Mehdi Hasan v. *Muhammad Hasan* (1) and *Khajoorconnissa* v *Rowshan Jehan* (2) followed.

The rule of law laid down by those authorities was not altered or qualified by the combined provisions of the Transfer of Property Act (IV of 1882) and the Indian Trusts Act (II of 1882), so as to make registration a substitute

* *Present*.—Lord ATKINSON, Lord PARKER of WADDINGTON, Sir JOHN EDGE and Mr AMEER ALI.

(1) (1906) I.L.R., 28 All., 420 (443); L.R., 33 I.A., 68 (76).

(2) (1878) I.L.R., 2 Calc., 184; L.R., 3 I.A., 291.

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

for delivery of possession. Both of those Acts were passed long before the first of those authorities was decided.

In a suit to enforce a mortgage executed by the widow of the settlor of property dealt with by the settlement:—

Held that during the life of the donor the evidence did not show that anything was done by him which amounted to delivery of possession of the properties, nor was anything done by the trustees or the wife alone amounting to proof of the acceptance of the gift or of an election to take under the deed. All her conduct and actions were entirely inconsistent with any such intention on her part. The trustees never entered under and by virtue of the trust deed into the receipt of the rent or income of the property comprised in the mortgage, and consequently there was no satisfactory proof that the possession of that portion of the property the subject of the gift was ever delivered by the settlor to the trustees. That being so the gift according to the Muhammadan law was void, and the mortgage sued upon was therefore a valid and binding instrument and a good security.

The statements made in documents signed by the wife, she must be taken to have known the purport and effect of, it being a part of the administrative duties of a quasi-judicial character imposed by the Oudh Land Revenue Act (XVIII of 1876), upon the public officials before whom the documents came, to see that she as a *pardanashin* lady had that knowledge, and the maxim "*Omnia praesumuntur recta esse acta*" was applicable.

On a question as to the legitimacy of one of the settlor's sons—

Held on the evidence that he was the legitimate son of the settlor, and was acknowledged by him to be so as the son of *nikâh* marriage.

The Muhammadan law as to acknowledgement laid down in *Muhammad Allahadad Khan* v. *Muhammad Ismail Khan* (1) and *Muhammad Ismat Ali Khan* v. *Lalli Begum* (2), and that as to evidence of repute from statement made in documents by a member of the family in *Anjuman Ara Begum* v. *Sadik Ali Khan* (3) and *Baqar Ali Khan* v. *Anjuman Ara Begum* (4) followed.

Their Lordships commented upon the long duration of this litigation, remarking that such delays were "discreditable to any judicial system, and there was no reason to think that they were not to a large extent avoidable." Also upon the undue prolongation of the cross-examination of witnesses by breaking it up into detached portions, than which no better system could be devised to expose witnesses to the risk of being tampered with and to promote the fabrication of false evidence.

A presiding Judge should endorse with his own hand a statement that a document proved or admitted in evidence was proved against or admitted by the person against whom it was used, as laid down in section 141 of the Civil Procedure Codes of 1877 and 1882, and practically re-enacted in order XIII, rule 4, of

(1) (1888) I.L.R., 10 All., 259.

(2) (1911) I.L.R., 8 Calc., 422 : L.R., 9 I.A., 8.

(3) (1899) 2 Oudh Cases, 115.

(4) (1903) I.L.R., 25 All., 236 : L.R., 30 I.A., 94.

the rules and orders passed under the Civil Procedure Code, 1908. With a view of insisting on the observance of the wholesome provisions of these Statutes, their Lordships will, in order to prevent injustice, be obliged, in future on the hearing of Indian appeals, to refuse to read or permit to be used any document not endorsed in the manner required.

Two consolidated Appeals 121 and 134 of 1913 from two decrees (13th November, 1911,) of the Court of the Judicial Commissioner of Oudh which partly reversed decrees (25th October, 1909,) of the Court of the Subordinate Judge of Lucknow. Of the suits in which the above mentioned decrees were passed the first was brought by Sadik Husain Khan to enforce a mortgage of the 26th of June, 1900, executed by Ummat-ul-Fatima Begam (the third respondent) in her own right and as guardian of Hashim Ali Khan and Kasim Ali Khan the first and second respondents; and the second by the first and second respondents for a declaration that another mortgage in favour of Sadik Husain Khan executed by Sultan Hasan Mirza (who claimed to be a step-brother of the first and second respondents) of his share of the family properties was a nullity on the ground that he had no interest therein.

The principal questions for decision in these appeals are (*a*) whether a certain trust settlement executed by Nawab Zaigham-ud-Daula in favour of his wife Ummat-ul-Fatima Begam and her sons Hashim Ali Khan and Kasim Ali Khan was a valid disposition of the properties therein comprised, and if so, whether the mortgage of the 26th of June, 1900, so far as it purported to charge the said properties was invalid; and (*b*) whether the said Sultan Hasan Mirza was a legitimate son of Nawab Zaigham-ud-Daula and entitled to a share of his estate.

Nawab Zaigham-ud-Daula was a Shia Muhammadan, and a son of Ali Naki Khan who was the Prime Minister of the last King of Oudh. On the 5th of February, 1895, Zaigham-ud-Daula executed in Calcutta the settlement above referred to, by which he purported to convey all the immovable properties he then possessed to his wife Ummat-ul-Fatima Begam and her father Muhammad Mehdi Ali Khan on certain trusts hereinafter referred to. The properties purporting to be comprised in the settlement were a house in Calcutta of considerable value and certain specified undivided shares in other landed properties in Lucknow and the

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

Lucknow district and in the districts of Fyzabad and Sitapur. It was admitted that at the time of the execution of the settlement no mutation of names in respect of the last mentioned properties was effected in favour of the trustees named in it, nor was any sort of formal transfer of possession made to them, and it would appear that the rents and profits of the properties continued to be received as before by Zaigham-ud-Daula as long as he lived.

In April, 1895, Iffat Ara Begam, one of the sisters of Zaigham-ud-Daula, died leaving as her heirs her husband Mirza Ali Gadar and Zaigham-ud-Daula himself, who thereupon became entitled to certain other properties or shares in properties in Lucknow and the districts before mentioned, which were admittedly not in any event affected by the settlement, and upon the death of Zaigham-ud-Daula, which occurred on the 1st of August, 1898, these last mentioned properties became divisible among his heirs according to Shia Muhammadan law.

The first wife of Zaigham-ud-Daula, namely, Munna Begam alias Ala Bahu, a daughter of the late Nawab of Murshidabad, and all his children by her, except his daughter Raushan Ara Begam, had predeceased him, and on his death his heirs were his sons Hashim Ali Khan and Kasim Ali Khan (the first and second respondents) with Sultan Hasan Mirza (if he was legitimate) Raushan Ara Begam, and his widow Ummat-ul-Fatima Begam.

After the death of Zaigham-ud-Daula, joint applications for mutation in respect of all the up-country properties, including those purporting to have been conveyed by the settlement of the 5th of February, 1895, were made by the heirs the widow acting for herself and as guardian of her two sons, who were then minors, and all the properties were accordingly transferred to their names; no suggestion being made by any member of the family that Sultan Hasan Mirza was other than a legitimate son of Zaigham-ud-Daula, and as such entitled to share equally with the other sons. In various other legal proceedings taken subsequently from time to time Sultan Hasan Mirza was joined as and admitted by all the parties interested to be a legitimate son and heir of Zaigham-ud-Daula.

On the 9th of June, 1899, Ummat-ul-Fatima Begam applied to the District Judge of Lucknow to be appointed guardian of the

1916

SADIK HUSAIN KHAN v. HAKIM ALI KHAN.

persons and property of her two minor sons treating the properties purporting to have been disposed of by the settlement of the 5th of February, 1895, as being part of Zaigham-ud-Daula's estate. Her father Muhammad Mehdi Ali Khan, on the 7th of July, 1899, made a counter application to be himself appointed guardian, on the ground that he had been appointed manager and trustee of the property of the minors by the settlement; but he made no protest against what had been done in the mutation proceedings. On the 18th of August, the Court ordered Musammat Ummat-ul-Fatima to be appointed guardian, stating that the order would not apply to the trust property which could be held and managed by the trustees; and on the 25th of August, 1899, a formal certificate of guardianship was issued in the name of the widow.

Amongst the properties inherited by Zaigham-ud-Daula from his sister Iffat Ara Begam was a $\frac{1}{4}$th share of a valuable property in the city of Lucknow, and known as Machhiwala Baradari which was subject to a mortgage decree obtained in the life-time of Iffat Ara Begam. On her death, her heirs Mirza Ali Gadar and Zaigham-ud-Daula were brought on the record of the mortgage suit, and, on the 27th of July, 1895, a final decree for sale of the property was passed against them. The property was not, however, brought to sale in the life-time of Zaigham-ud-Daula, but after his death the mortgagees, in June, 1900, proceeded to sell it, a sum of Rs. 21,650 being then due under the decree. There was also another decree charged upon the property for Rs. 9,700 at the suit of another party to the same mortgage, and there were other debts to a large amount owing by the estate of Zaigham-ud-Daula, some of which were payable out of the properties comprised in the settlement.

Accordingly, on the 13th and 26th of June, 1900, Ummat-ul-Fatima applied to the District Judge of Lucknow for leave to mortgage to the appellant (Sadik Husain Khan) the shares of the minors in certain of the properties scheduled to the application (which included properties comprised in the settlement), together with her own share therein, in order to pay off a portion of the mortgage debts of Iffat Ara Begam, and so obtain a stay of the impending sale. A draft of the proposed mortgage deed to the appellant was annexed to the second application, being for a total sum of

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN

Rs. 20,000. On the 26th of June, permission was given by the District Judge to mortgage the minors' shares in the properties to the extent of Rs. 16,000 upon the terms of the draft mortgage, and the mortgage-deed was executed on the same day and the sum of Rs 20,000 advanced on the security thereof by the appellant out of which Rs. 18,000 was deposited in court by Ummat-ul-Fatima and paid to the decree-holders, and the sale was thereupon stayed.

On the 30th of April, 1907, the due date for repayment of the mortgage money having long expired, the appellant filed suit 76 of 1907, for realization thereof, making defendants thereto Ummat-ul-Fatima, Hashim Ali Khan, and Kasim Ali Khan, for whom, on the non-appearance of Ummat-ul-Fatima, Muhammad Mehdi Ali Khan was appointed guardian *ad litem*, and through him they filed a written statement of their defence, setting up the settlement, and pleading that the mortgage sued on was not for their benefit, and that the permission granted therefor by the District Judge was obtained by the fraud of their mother in collusion with the appellant.

The following are the issues now material

(1) Did Zaigham-ud-Daula create a trust? If so, is it a valid one?

(2) Or whether the trust transaction was a fictitious and fraudulent one and was never acted upon?

(3) Whether defendant (the 3rd respondent) was competent to mortgage the property in dispute?

(4) Whether the certificate of guardianship did not embrace the property in suit? If so, was the permission validly obtained?

(5) Or was the permission obtained by fraud and misrepresentation?

(6) Whether the plaintiff (the appellant) is a *bonâ fide* mortgagee, and the money advanced for the benefit of the minors? If so, with what effect?

The provisions of the settlement were shortly as follows :—

The parties to it were Zaigham-ud-Daula of the first part, Ummat-ul-Fatima of the second part, and Ummat-ul-Fatima and Muhammad Mehdi Ali Khan (the Trustees) of the third part. It recited *(inter alia)* that a sum of Rs. 85,000 was due by Zaigham-ud-Daula to Ummat-ul-Fatima for the balance of her dower, and

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

that it had been agreed between the parties that the settlement thereby made should be in full satisfaction of this debt, and witnessed that for the consideration stated Zaigham-ud-Daula granted the said properties to the Trustees upon trust (subject to certain small annuities to defendants) to pay the net incomes of the properties to Ummat-ul-Fatima for her life, subject to the cost of maintaining and educating their children, and after the death of Ummat-ul-Fatima, upon trust for all the children of Zaigham-ud-Daula by her "living at the time of the decease" of Zaigham-ud-Daula. The form of the indenture showed that it was intended to be executed by Ummat-ul-Fatima as well as by Zaigham-ud-Daula, but she did not in fact execute it, and the document was left during the remainder of the life-time of Zaigham-ud-Daula in the custody of the solicitor by whom it was prepared. No evidence was given that Ummat-ul-Fatima had at any time agreed to accept the provisions of the settlement of February, 1895, in satisfaction of her dower-debt of Rs. 85,000, nor was she called as a witness in either of the cases, and it was a reasonable inference from her conduct that she never in fact accepted it. In her application to the District Judge for leave to mortgage her minors sons' shares, she annexed to her petition a schedule showing the debts due by the estate of Zaigham-ud-Daula, in which she entered herself as a creditor for Rs. 85,000, which was obviously intended to be in respect of the dower-debt.

The second suit, 51 of 1908, arose out of a mortgage executed in favour of Sadik Husain Khan (the appellant) by Sultan Hasan Mirza of his share in the properties left by Zaigham-ud-Daula, including those purporting to have been disposed of by the settlement of 1895. The mortgage was dated the 3rd of November, 1900, and the appellant had in 1907 brought a suit thereon and obtained the usual mortgage decree for sale. The appellant having applied for execution of the decree, Hashim Ali Khan (who had then attained his majority), on the 22nd of February, 1908, filed the present suit for a declaration that Sultan Hasan Mirza had no right to any part of the properties, and in effect that the mortgage decree obtained by Sadik Husain Khan was a nullity, no consequential relief being asked. The second respondent Kasim Ali Khan was joined as a co-plaintiff to the suit by Hashim Ali Khan

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

as his next friend, and Sultan Hasan Mirza, though not originally sued, was added as a co-defendant with the appellant under an order of the Court. The claim of the plaintiffs was based both upon the settlement of 1895, and upon the allegation that Sultan Hasan Mirza was not the son of Zaigham-ud-Daula.

Sadik Husain and Sultan Hasan Mirza filed separate written statements of their defences to the suit, asserting that the latter was a legitimate son of Zaigham-ud-Daula, and denying the validity of the settlement, and also pleading that the suit was barred by section 42 of the Specific Relief Act (I of 1877).

The following issues were raised, (1) Did Zaigham-ud-Daula create a *bonâ fide* trust in favour the plaintiffs and their mother under a deed, dated the 5th of February, 1895 ? (2) Was it assented to by plaintiffs' mother Ummat-ul-Fatima ? (3) Was it inoperative, fraudulent, or otherwise illegal ? (4) Are the plaintiffs the sole male heirs of Zaigham-ud-Daula ? Or is defendant No. 2 also Zaigham-ud-Daula's legitimate son ? (5) Is the suit not maintainable under section 42 of Act I of 1877 ?

The questions with regard to the validity of the settlement were the same as in the previous suit. As to the legitimacy or otherwise of Sultan Hasan Mirza, it was admitted by both parties that his mother was a slave girl named Zohra, who was brought by Ali Naki Khan, the father of Zaigham-ud-Daula, from Karbala. The case made by the plaintiffs in suit 51 of 1908 was that Sultan Hasan Mirza was the illegitimate son of Zohra by a menial servant named Mir Muhammad, and that he never was treated or had the slightest pretension to be treated as a son of Zaigham-ud-Daula : while the case of the other side was that Zohra was married by *mutâ*, or temporary marriage, to Zaigham-ud-Daula, that Sultan Hasan Mirza was the legitimate offspring of that marriage, and had been repeatedly acknowledged by Zaigham-ud-Daula to be so, and was so treated by him and all the other members of the family, including the sisters of Zaigham-ud-Daula. The evidence was conflicting and it is sufficiently stated and discussed in the judgement of the Judicial Committee.

For the respondents was put in evidence and relied on a book called Tarikh Quisari, a sort of autobiography composed by Zaigham-ud-Daula and distributed by him among his friends, in which

though he mentioned his other children, he made no reference to Sultan Hasan Mirza.

Both suits were separately tried by the Subordinate Judge. The question of the validity of the settlement was dealt with at length in the judgement of the second suit only. The Subordinate Judge was of opinion that it was never intended by Zaigham-ud-Daula to be operative, and was not treated as being so by Ummat-ul-Fatima; but was devised to secure to Zaigham-ud-Daula the enjoyment of the property without apprehension of its seizure by his creditors; and that if it was intended to be a genuine disposition of his property, it was invalid under Muhammadan law for want of transfer of possession; and the trusts in favour of Hashim Ali Khan and Kasim Ali Khan were bad as constituting contingent gifts. With regard to the mortgage of the minors' shares, he was of opinion that the purpose of it was a proper one, and that the sanction of the court was obtained without misrepresentation, and he held that the mortgage was binding on Hashim Ali Khan and Kasim Ali Khan to the extent of Rs.16,000 for which the sanction was granted. On the question of the legitimacy of Sultan Hasan Mirza, he held that having regard to the fact that Sultan Hasan Mirza had been admitted without dispute in the mutation and other proceedings as a legitimate son and heir of Zaigham-ud-Daula, and had been in possession as such ever since, the *onus* of disproving his status was upon the plaintiffs, and after fully examining the evidence he summed up his conclusions as follows:—"In my opinion the plaintiffs have failed to prove the absence of a legitimate connection between their father and defendant No 2 while the evidence for defendants proves defendant No. 2 to be a legitimate son of Zaigham-ud-Daula."

The Subordinate Judge also held upon the 5th issue in suit 51 of 1908 that as Sultan Hasan Mirza was proved to be in possession of his share in the property the declaratory relief claimed by the plaintiffs could not be granted.

Decrees were passed in accordance with these findings in each of the suits respectively.

From those decrees appeals were brought by the plaintiffs, and were heard by the court of the Judicial Commissioner (Mr. L. G.

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

EVANS, Judicial Commissioner, and Mr. B LINDSAY, Additional Judicial Commissioner) who allowed the appeal in each case, in suit 76 of 1907, limiting the mortgage decree passed by the first court to certain portions only of the property inherited by Zaigham-ud-Daula, after the date of the settlement, being the unincumbered portions of the estate of Iffat Ara Begam; and in suit 51 of 1908 making the declaration sought by the plaintiffs.

The judgement of the Court of the Judicial Commissioner will be found in 14 Oudh Cases, page 356

On these appeals—

Sir John Simon, K. C., Sir W. Garth, and *Abdul Majid,* for the appellant, contended that the settlement of the 5th of February, 1895, was not a genuine disposition of the properties purporting to be comprised therein, but was merely intended by Zaigham-ud-Daula to protect them from his creditors, and not having been executed by Ummat-ul-Fatima, nor accepted by her as a satisfaction of her dower-debt, the deed was inoperative and of no effect. The release of the dower-debt was the alleged consideration for the settlement, and Ummat-ul-Fatima certainly never accepted it in lieu of her unpaid dower. Her actions since her husband's death had been for the most part distinct repudiations of the settlement; and she claimed to be a creditor of her husband. The Court of the Judicial Commissioner erred in holding that Muhammadan law should not be applied to the present case. It is made applicable, it was submitted, by section 3, clause (*b*), of the Oudh Laws Act (XVIII of 1876), which makes Muhammadan law govern (among others) questions of "gifts" among Muhammadans. They would include "gifts" of all kinds—voluntary gifts and even gifts to trustees in trust for the donees. The Court of the Judicial Commissioner puts too narrow a construction on the word "gifts". If the Muhammadan law be applicable, a formal transfer of possession was necessary to validate the gift, and there was no evidence of any such transfer having been made; that was for the respondents to show, see *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1) and *Khajoorunnissa* v. *Roeshan Jehan* (2). The evidence, on the contrary, showed that Zaigham-ud-Daula

(1) (1906) I.L.R., 28 All., 139 (149); L.R., 33 I.A., 68 (76).

(2) (1876) I.L.R., 2 Calc., 184 (197); L.R., 3 I.A., 291 (305,307).

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

was, after the settlement, in possession of the properties, and no mutation of names took place in favour of the trustees of the deed, there was no real intention of the Nawab to divest himself of the properties. The trust in favour of his sons and Ummat-ul-Fatima, following upon the life estate, was contingent upon their surviving him, and there were contingent resulting trusts to the settlor himself which were all invalid by the Muhammadan law, under which a gift cannot be contingent, but the donor must entirely divest himself of what is the subject of the gift.

As to the question of the legitimacy of Sultan Hasan Mirza which arose in the second of the appeals, the *onus*, it was submitted, was on the respondents to show that he was not legitimate, in other words they ought to prove what they assert as plaintiffs in the suit, see Evidence Act (I of 1872), sections 101 and 102. But even if the *onus* be on the appellant, the evidence, it was submitted, was sufficient to fully establish his legitimacy. The evidence showed that Zaigham-ud-Daula acknowledged Sultan Hasan Mirza as his son and heir by a *muta* marriage, and that he so treated him during his life-time. The facts that after the death of Zaigham-ud-Daula Sultan Hasan Mirza was recognized by all the adult members of the family as a legitimate son of the Nawab, and that his name was joined without dispute in the mutation and other legal proceedings consequent on the Nawab's death, were strongly confirmatory of such acknowledgement. Ummat-ul-Fatima, who must have known the true facts, was not called as a witness on behalf of her sons.

De Gruyther, K.C., and *B. Dube*, for the respondents, contended that the deed of trust was a valid and effective settlement and was binding on the parties. No authority had been cited which invalidated it by Shia Law. A Shia Muhammadan can create an estate for life with a contingent interest to some one else. Reference was made to *Banoo Begum* v. *Mir Abed Ali* (1); *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (2); *Umes Chunder Sircar* v. *Zahur Fatima* (3); and Wilson's Anglo-Muhammadan Law, page 332. An intention that only children

(1) (1907) I.L.R., 32 Bom., 172 (179). (2) (1867) 11 Moo. I.A., 517 (533,543).

(3) (1890) I.L.R. 18 Calc., 164 (176); L.R., 17 I.A., 201 (209).

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

living at the death of the settlor should take would be valid. The settlor in this case had no intention of a resulting trust. A gift cannot be made to take effect at an indefinite time, but that was only following the principle that to make a gift good it has to be accompanied by possession. Shia law recognized limited estates; Ameer Ali's Muhammadan Law (Ed. 1912), Volume I, page 142. There was nothing to show that a gift with a reservation by the donor to himself for life was invalid. That is the most common form of *waqf*. The cases of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1) and *Khajooroonnissa* v. *Rowshan Jehan* (2) had no bearing whatever as authorities on this point. In view of what had happened since the settlement was executed, it was submitted it was not void in its inception. The Muhammadan Law, however, did not govern the present case, for section 3, clause (*b*), of the Oudh Laws Act (XVIII of 1876), did not by the word "gifts" include hiba-bil-ewaz (gifts for consideration) or trusts, to which since 1882, the provisions of the Transfer of Property Act (IV of 1882) and the Trusts Act (II of 1882), apply, even between Muhammadans, except in the case of simple gifts. The settlement in the present case complies with all the requirements of section 5 as being a non-testamentary instrument in writing signed by the settlor and registered, and contains all the particulars referred to in section 6 of the Trusts Act. By the Transfer of Property Act registration takes the place of delivery of possession; and transfer to the trustees was complete when the deed was registered, no further delivery being required. Reference was made to *Moosabhai* v. *Yacoobbhai* (3); and *Ramanadha Mudaliar* v *Baghiralhi Ammall* (4). The trustees in the present case were in possession of the most valuable portion of the properties, the house property in Calcutta, and had dealt with it under the trust. Ummat-ul-Fatima was not ignorant of the trust, as she was a party to the litigation by the trustees as to that property, and she subsequently to her husband's death elected to accept it in lieu of her dower. The Subordinate Judge refused

(1) (1906) I.L.R., 28 All., 439 (449): L.R., 33 I.A., 68 (75,80).

(2) (1876) I.L.R., 2 Calc., 184 (197). L.R., 3 I.A., 291 (307,309).

(3) (1904) I.L.R., 29 Bom., 267 (274).

(4) (1906) I.L.R., 29 Mad., 413.

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

to allow her to be called as a witness when the respondents wished to have her evidence taken.

With regard to the second appeal it was contended that the evidence established the illegitimacy of Sultan Hasan Mirza. Apart from the oral evidence, which left it very doubtful whether he was ever absolutely acknowledged by the Nawab to be his legitimate son, the chief evidence against his being so was a book called the "Tarikh Qusari," a sort of autobiography written by the Nawab himself in 1892, and distributed by him amongst his friends, in which he mentioned by name all those who were his heirs, but the list did not contain the name of Sultan Hasan Mirza. The petition of Ummat-ul-Fatima in the mutation proceedings in which his name appears as one of the heirs was not entitled to any weight as evidence: it would have been drawn up by some one on her behalf, and there was nothing to show that she was acquainted with its contents. The Court of the Judicial Commissioner rightly put the *onus* on the present appellants to prove Sultan Mirza's legitimacy, and they had not discharged it. The alleged acknowledgements of him by the Nawab did not amount to acknowledgement that he was a legimate son. If he was illegimate, as it is submitted he was, no amount of acknowledgement would legitimize him. Reference was made to *Abdul Razak* v. *Aga Mohomed Jaffer* (1); *Muhammad Azmat Ali Khan* v. *Lalli Begum*, (2) and *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (3).

Sir John Simon, K. C., in reply. The burden of proof was on the respondents, there was no repudiation by the Nawab of Sultan Hasan Mirza's legitimacy. Acknowledgement as a legitimate son is valid until rebutted, and there was no adequate evidence in rebuttal of the appellant's case, while evidence of repute strongly supported it; *Bagar Ali Khan* v. *Anjuman Ara Begam* (4). Ummat-ul-Fatima accepted the position of Sultan Hasan Mirza as determined by the mutation for 10 years, and the estate went in accordance with that mutation. On the other part of the case, there is a great difference between contingent gifts and

(1) (1893) I.L.R., 21 Calc., 666: L.R., 21 I.A., 56.
(2) (1881) I.L.R., 3 Calc., 422: L.R., 9 I.A., 8.
(3) (1888) I.L.R., 10 All., 289.
(4) (1903) I.L.R., 25 All., 236 (245): L.R., 30 I.A., 94 (103).

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

gifts with conditions attached. Ameer Ali's Muhammadan Law, Volume I, page 138 Contingent gifts are void. Refrence was made to *Roshun Jahán* v *Enael Hossein* (1) per *Sir Barnes Peacock, C J*; *Yusuf Ali* v. *Collector of Tippera* (2); and *Chekkone Kutti* v. *Ahmed* (3). The doctrine of election only applies to validate a gift if the donee elects on a knowledge of all the facts: election is not a consideration in any way.

1916, July 11th:—The judgement of their Lordships was delivered by Lord ATKINSON:—

These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, Lucknow, both dated the 13th of November, 1911, which reversed in part and modified in part two decrees, each dated the 25th of October, 1909, of the Court of the Subordinate Judge of Lucknow.

The first of the two suits in which those last-mentioned decrees were made, namely, that numbered 76 of 1907, the appeal in which is No. 121 of 1913, was instituted by Mirza Salik Husain Khan, the appellant in both the present appeals, to enforce a mortgage, dated the 26th of June, 1900, executed in his favour by the third respondent in the first appeal, namely, Nawab Ummat-ul-Fatima, in her own right, and also as guardian of her two sons, then minors, the first and second respondents in the first appeal, to secure the repayment of 20,000 rupees admittedly advanced by the mortgagee to this lady, with interest at 1 per cent. per mensem.

The second of those suits, namely, that numbered 51 of 1908, the appeal in which is numbered 134 of 1913, was instituted by the respondents Nawab Saiyid Hashim Ali Khan, and Nawab Kasim Ali Khan, the latter by his guardian, against this same mortgagee and one Sultan Mirza, claiming to be the step-brother of the plaintiffs, for a declaration that a second mortgage made by the said Sultan Mirza of his share in all the family property in this mortgagee's favour, to secure the repayment of a sum of 8,000 rupees, with interest, was a nullity, on the ground that the said Sultan Mirza was not entitled to any share in the family property, first by reason of the provisions of a

(1) (1866) 5 W.R., 4. (2) (1892) I L.R., 9 Calc., 138 (143).

(3) (1887) I.L.R., 10 Mad., 196 (196).

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

certain indenture, dated the 5th of February, 1895, hereafter dealt with, and secondly because he was not the legitimate son of his alleged father, the grantor in the said deed. This declaration is the only specific relief prayed for, but there is a prayer for general relief.

The litigation relates to the estate of Nawab Zaigham-ud-Daula, who was the son of the Prime Minister of the last King of Oudh, and a Muhammadan of the Shia sect. He was admittedly regularly married twice. By his first wife, Badshah Begam, he had two sons and one daugater, who predeceased him, and one daughter, Raushan Ara Begam, who survived him By his second wife, the third respondent in the first appeal, married after the death of the first wife, he had two sons, the first and second respondents in that appeal. He died on the 1st of August, 1898.

Both these suits were tried by the same Subordinate Judge, who delivered separate judgements. The Court of the Judicial Commissioner dealt with both the appeals in one judgement

The appellants and the respondents in both appeals agree in stating that the principal questions for decision are (1) whether this trust indenture of the 5th of February, 1895, duly executed by the deceased Nawab and registered, was a valid disposition of the properties therein comprised, and, if so, whether the abovementioned mortgages, so far as they purport to charge these properties and the alleged share of Sultan Mirza in the family property respectively, are invalid, and (2) whether Sultan Mirza was shown to be the legitimate son of Zaigham-ud-Daula, the grantor in the trust deed. It was not, as their Lordships understood, disputed that the sum of 20,000 rupees, purported to be secured by the first mortgage, was, in fact, advanced to the Nawab's widow, nor that it was borrowed for the purpose of being applied in payment of certain of the settlor's debts, in order to save some of the properties comprised in the trust deed from being sold at the suit of some unsatisfied creditors, nor that it was, in fact, so applied. No question was raised as to whether the first mortgage did not, under the circumstances, capture whatever interest the three respondents might have had in the entire immovable property of Zaigham-ud-Daula, however derived. Their Lordships

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

therefore base their decision solely on the points raised by the parties and dealt with by the Courts below.

It was contended in the second suit by Mirza Sadik Husain Khan, the mortgagee, that, between the dates of the marriages of the Nawab with the two above-mentioned ladies, he contracted a marriage in the *muta* form with an Abyssinian slave girl, named Zohra Kainam, who had been brought home by his father on the occasion of his making a pilgrimage to Mecca and subsequently given by the father to him, and that Sultan Mirza was the offspring of that union. The fact that such a marriage ever took place was denied by the plaintiff in that suit, and a vast body of evidence, oral and documentary, was adduced by both sides on the issue of Sultan Mirza's legitimacy.

Now, as to the trust deed of the 5th of February, 1895, it is necessary, in order to determine the issue raised in reference to it, to consider first, its provisions; second, the circumstances under which, and the purpose for which, it was apparently executed; and thirdly, the mode in which the property purporting to be conveyed by it was subsequently treated and dealt with by those having rights over or interest in it.

The parties to the deed are the Nawab Zaighum-ud-Daula, of the first part, Fatima, described as his second wife, of the second part; and Nawab Muhammad Mohib Ali Khan and the aforesaid Fatima, described as trustees, of the third part. After reciting that the Nawab Zaighum-ud-Daula was seised and possessed for an estate of inheritance in possession of certain undivided shares in certain zemindari villages, and other landed properties in Lucknow, and in the districts of Lucknow, Fyzabad and Sitapur, and also of a house in Calcutta numbered 13, Russell Street; that on the treaty of the marriage with his said wife, Fatima, he had agreed to give her a dower of one lakh of rupees, and also to settle upon her a monthly allowance of 100 rupees; that in part-performance of that agreement, and in satisfaction of this monthly allowance, he had by a registered instrument, dated the 14th of October, 1887, transferred to her a certain house, described as yielding a monthly rent of 100 rupees which she had since enjoyed; and had, in addition, already paid to her 1,500 rupees in part-payment of her dower, leaving the sum of 85,000 rupees, the balance thereof,

unpaid; that he had, by gifts of jewellery and effects of the value of one lakh and 50,000 rupees, and otherwise, provided for his children by his first wife; that with a view to prevent further disputes, quarrels and litigation between his said wife, Fatima and her children, and the children of his first marriage, he was desirous of making the settlement thereafter appearing, it was agreed between the parties thereto that the said intended settlement should be in full payment and satisfaction of the dower payable by him, as therein mentioned. He, in consideration of the premises, and in payment and discharge of the balance of the dower payable by him, granted, conveyed and assigned to the trustees and their heirs all the lands, tenements and hereditaments in the schedule to the deed mentioned, to hold the same, subject to a certain mortgage therein specified, to the payment of certain small annuities to the persons therein named, and to the cost of maintaining and managing the said properties and collecting the rents thereof, in trust to pay the income of the same to his said wife, Fatima Begam, during her life, for her sole and separate use, subject to the cost of maintaining and educating his children by her, and after her death, in trust for all the aforesaid children living at his, the settlor's, death as tenants in common, in equal shares A power of leasing for a term of six years was given to the trustees, and a provision introduced that in case one of the trustees should die, or be unable or unwilling to act, the Official Trustee of Bengal should be appointed trustee in such trustees' stead. The deed contains, in addition, the usual covenants by the settlor for good title and quiet enjoyment. This deed is in the English language. It does not contain any formal release of Fatima Begam's right to payment of the unpaid balance of her dower. It is executed by the settlor alone. Mr. George Charles Farr, his solicitor, and Priya Lal Mullick, described as a solicitor, but in fact the clerk of Mr. Farr (to whom the mortgage mentioned in it was made), are the witnesses to it. The lady was not examined as a witness. No proof whatever, independent of the deed, was given that any agreement such as is mentioned in it was ever entered into between the settlor and his wife, Fatima Begam, to the effect that she would accept the provision purported to be made for her by it in satisfaction and discharge of her claim for the

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

unpaid balance of her dower. That agreement, however, is the only valuable consideration moving to the settlor given for the grant he makes. Unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely voluntary, Fatima Begam might, no doubt, acting with full knowledge of her rights, deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect, she would be bound by the choice thus made. But that election could not create the agreement between her and her husband, which is the sole consideration for the deed, nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift, and the property which it passed would have to be ascertained on that footing. Subsequent election could not be held to be a substitute for the original consideration.

The interests granted to the children are contingent on their surviving their father. By the happening of that event, the class to take is to be ascertained. Children born after the date of the deed, but alive at the death of the settlor, would be members of that class. In addition, the deed fails to provide expressly or impliedly for the payment of the income of the property held in trust on each of three different contingencies. First, the contingency of Fatima Begam dying childless in her husband's life-time; second, of her predeceasing him leaving children, none of whom survived him; and, third, of her predeceasing him leaving children some of whom survived him. In each of these cases a resulting trust in the settlor's favour would arise on the death of his wife. In the first case, of the absolute beneficial interest in the trust property; in the second, of the income of that property while any of his children lived, and of the absolute beneficial interest in it on the death of the survivor of them; and in the third case, of the income of the trust property in the interval between the death of his wife and his own decease. So that the settlor has not by the provisions of this deed divested himself absolutely, but only in certain contingencies, of all interest in the property granted and conveyed by it. It was contended by Sir *John Simon*, on behalf of the appellants, that by reason of the conditional nature

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

of this gift to the trustees, the contingent nature of the provision for the children, and these contingent resulting trusts in the settlor's favour these dispositions made by the deed were void under the Muhammadan law observed by the Shia sect.

These are no doubt very important points. Owing, however, to the conclusions at which their Lordships have arrived on the other points raised in the case, they do not find it necessary to express any opinion on these points and, therefore, abstain from doing so. By the third section of the Oudh Laws Act (XVIII of 1876) it is enacted that between Muhammadans the Muhammadan law is to be applied to the many important matters therein enumerated, including amongst others, "wills, legacies and gifts". The Court of the Judicial Commissioner has held that the term "gifts" as here used, does not include gifts in trust. Their Lordships cannot adopt such a narrow construction of the term "gift" as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a gift by A. to C. direct would be governed by the Muhammadan law, a gift by A. to B. in trust for C. would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the Statute. The Muhammadan law, in their view, therefore, applies to this deed; and the gift made by it, being voluntary, will under that law be void, unless it be accompanied by a delivery of such possession as the subject of the gift is susceptible of.

In *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*(1) it is, at p. 76 of the report, laid down by this Board that, according to Muhammadan law, a holder of property may in his life-time give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property and

(1) (1905) I L.R., 28 All., 489 (449): L.R., 33 I.A. 68 (76).

1916

SAIK OBAIN KHAN v. HIM ALI KHAN.

to confer it upon the donee must also be proved. The case of *Ranee Khajooroonnissa* v. *Rowshan Jehan* surpports this statement of the law (1).

As six out of the ten hereditaments granted by the deed consist of undivided shares in certain zamindari villages and parcels of land, physical possession is, in their case, impossible, and as to them, the receipt of the appropriate portion of the rent or income issuing out of or derived from them is the only form the necessary possession could assume. The validity of the grant of these items of property would depend, therefore, upon whether the trustees of the deed, to the exclusion of all other persons, entered into the receipt or enjoyment of these rents or income. Mr. *De Gruyther* contended, however, as their Lordships understood him, that the rule of law laid down by those authorities was altered or qualified by the combined operation of "The Transfer of Property Act" (Act IV of 1882); and "The Indian Trusts Act" (Act II of 1882). He insists that if the deed of gift of immovable property be duly registered, delivery of possession is not necessary to make the gift valid, or, if necessary, may be effected at any time during the donor's life, provided he be then capable of giving the property. By section 122 of the first of these statutes a "gift" is defined to be a transfer of existing movable or immovable property voluntarily without consideration by one person, calling himself a donor, to another, called a donee, and accepted by or on behalf of the donee. The acceptance must be made during the life-time of the donor, and while he is still capable of giving. If he should die before acceptance, the gift is void. If the subject of the gift be immovable property, then, by section 123, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. By section 125 it is provided that a gift of a thing to two or more donees, of whom one does not accept, is void as to the interest he would have taken had he accepted.

Section 55 of the Indian Trusts Act enacts that, subject to the trust, the beneficiary has a right to the rents and profits of the trust property, and section 56, that where there is only one beneficiary and he is competent to contract, or where

(1) (1876) L.R., 3 I.A., 291 (302).

there are several beneficiaries competent to contract and all are of one mind, he or they may require the trustee to transfer the property to him or them, or to such person as he or they may direct.

Both these Statutes, however, were passed long before the year in which the first of the above-cited authorities was decided. The 122nd section of "The Transfer of Property Act" still requires a "transfer" to be made of the subject of the gift. This would *primâ facie* mean a valid transfer, and would therefore require the transfer to be accompanied by delivery of possession. But it is argued that there can be no delivery without acceptance by the donee of the gift. It implies acceptance, and as acceptance may take place at any time during the donor's life, under the condition mentioned, it follows that the required delivery of possession may take place at any time during his life under the same conditions. Their Lordships think that this line of argument is unsound, but even if it were sound, it is not pretended that during the life of the donor in the present case anything was done by him which would amount to delivery of possession of the properties comprised in the mortgage deed, or anything done by the trustees or by Fatima Begam alone, which would amount to proof of an acceptance of the gift, or of an election to take under the deed of the 5th of February, 1895, save what happened in a friendly suit instituted by the deceased Nawab against the trustees on the 10th of September, 1895, to obtain permission to sell the Kothi, 13, Russell Street, Calcutta. This matter will be dealt with in its chronological order.

As to the circumstances under which this trust deed was executed, it was contended on behalf of the appellant that the settlor was heavily indebted at its date, and that by it he purported to divest himself of almost all the property then belonging to him, that it was merely designed to protect him against the claims of his pressing creditors, and was never intended by him to be an operative instrument. It is clear from the entries in the day book of Mr. Farr, his solicitor, that Zaigham-ud-Daula did not, at first, intend to make any disposition in trust of the property comprised in the deed, and it is equally clear that he never intended that the deed should contain any clause releasing his wife's claim for the

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

unpaid balance of her dower. A clause to that effect was introduced by counsel into the draft sent to him to settle. It was a natural and proper provision, if the agreement mentioned in the deed between the settlor and his wife had ever in fact been entered into; but, notwithstanding that the settlor was advised by his solicitor to allow this clause to be embodied in the deed, he absolutely declined to do so, and it was accordingly omitted from it. Again, while he lived no mutation of names took place as to his shares in the zamindari villages or lands to which mutation was applicable.

To some of the properties comprised in the deed mutation, no doubt, did not apply. But if this was a genuine transaction, and the deed was intended to be an operative instrument, there was no reason why the names of the trustees should not have been substituted for that of the settlor on the registry in reference to these villages, and many reasons why they should have been so substituted. It would have completed the transaction and tended to remove all doubt about its nature. That, however, was not all. The income of the trust property was never during the lifetime of the settlor, paid to the trustees or to the wife. Mehdi Ali Khan, the father of Fatima Begam, one of the trustees, was also mukhtar of Zaigham-ud-Daula, and he states that the Hakim Safdar Husain, the thekadar, made the collections; that this man sent the income of these villages to him, and that he, as such mukhtar, brought the money to Zaigham-ud-Daula during the latter's life. This was a direct breach of trust if the deed was an operative instrument.

These facts are, no doubt, calculated to throw grave suspicion on the genuineness of the transaction of February, 1895, but they do not appear to their Lordships to be sufficiently convincing to induce them to rest their judgement upon them rather than upon other points where, in their view, there is less room for doubt.

The written statement filed by the trustees in the friendly suit above mentioned was most relied upon It is dated the 16th of December, 1895. In that suit Mr. Farr was solicitor for Zaigham-ud-Daula. His partner was solicitor for the trustees. Mehdi Ali Khan gave the instructions to this gentleman. There is no

proof whatever that he ever communicated with Fatima Begam on the subject.

The plaint is a lengthy document. It sets out, amongst other things, the deed of the 5th of February, 1895. The written statement of the trustees begins by admitting all the statements contained in the plaint, and then states that the defendants are trustees appointed under the deed of the 5th of February, 1895, and as such hold the several tenements and hereditaments described in the schedule annexed to it upon the trusts created by it. That is all as to the contents or provisions of the deed. In fact, the Nawab himself was then receiving the rents of those hereditaments and continued to do so for two years afterwards, and in the plaint it is stated the Nawab himself had entered into a conditional contract for the sale of the Russell Street premises for 1,25,000 rupees. The written statement purports to be signed twice by each of the trustees, and signed once by their attorney, Priya Lal Mullick. Over one set of the signatures of the trustees it contains the usual declaration by the defendants that the statements contained in the document are true to their knowledge, except as to matters stated on information and belief, and as to such matters they believe them to be true. And following this is the endorsment—"Explained by me to the defendants above named, Priya Lal Mullick, articled clerk to Mr. G. C. Farr, solicitor, Calcutta." That is the Nawab's solicitor. This witness was not produced, and no explanation was given for his absence. And though Mehdi Ali Khan identifies his daughter's signature to this written statement, exhibit No. 5, he says nothing about the document being read and explained either to himself or to her.

In their Lordships' view it is impossible under these circumstances to accept this written statement as satisfactory proof that the contents, purport or effect of this trust deed were ever brought to the knowledge of Fatima Begam; that she had ever as a trustee accepted the gift purporting to be contained in it, or ever on her own behalf accepted the provision purporting to be made by it for her and her children in satisfaction of her claim for the balance of her dower. Her subsequent conduct and action up to and including the execution of the mortgage

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

sued upon is, they think, entirely inconsistent with any such intention on her part.

These latter are most significant. On the 7th of September, 1898, less than six weeks after her husband's death, proceedings, to which she was a party, were instituted to obtain mutation of names in reference to his undivided share in seven zamindari villages. She was presumably made aware of the nature and object of these proceedings and the purport and effect of the documents that bear her name. If she was then aware of the existence and provisions of the trust deed, these proceedings amount, first, to a most emphatic repudiation of it; second, to a most emphatic assertion of Sultan Mirza's legitimacy; and thirdly, a determined effort, against her own pecuniary interest, and that of her children, to confer upon him certain proprietary rights.

Separate applications were made, one for each village. That dealing with the lands of Mahtab Bagh may be taken as typical of them all. It purports to be made under the provisions of section 61 of Act XVII of 1876 (The Oudh Land Revenue Act). Having regard to the contention of the respondents that no weight or significance is to be attached to the statements contained in documents such as those signed by her in these proceedings, unless and until it be proved affirmatively that their contents were fully understood by her, it is essential to examine some of the provisions of this Statute. By section 61, it imposes on all persons obtaining possession of land or the profits thereof, whether by succession, purchase or other form of transfer, a statutory duty to give notice of the same, immediately after it has taken place, to the tahsildar of the tahsil in which the mahal to which the land belongs is situated, or to the Deputy Commissioner of the district. If the notice be given to the former that officer is bound to report to the Deputy Commissioner. By section 62 the Deputy Commissioner, on receiving this notice, is bound to make such inquiry as the Chief Commissioner may from time to time prescribe, in order to ascertain the fact of the alleged transmission of the property, and, if the transfer appears to have taken place, he must, in accordance with the rules made by the Chief Commissioner, record the same. This entry, no doubt, does not prejudice the right of any person who

may claim and establish in a Court of competent jurisdiction a right to an interest in the land to which the entry refers. Section 63 enacts that if the person succeeding be a minor or under disability, the guardian or other person who shall have charge of the property, shall give the notice, and by section 64 a fine is imposed on any person neglecting for three months to give the notice prescribed by section 61.

These are the administrative duties of a quasi-judicial character imposed upon these public officials. It is scarcely conceivable that when the application is grounded upon the statement contained in a petition signed by a *purdanashin* lady, both on behalf of herself and as guardian of her children, these officials would omit to take adequate steps to ascertain whether she knew the purport and effect of the document she signed. He would utterly fail in his duty if he omitted to do so, and in the absence of all evidence that he did fail in his duty in this respect, the maxim *omnia praesumuntur recte esse acta* must, their Lordships think, be applied to the proceedings.

Now in the body of the petition it is stated that Zaigham-ud-Daula died on the 1st of August, 1898, and that the five persons named, beginning with Sultan Mirza, described as his son, were his heirs. The undivided shares of the deceased in the several villages to which these heirs became entitled are stated, namely, two shares to each of the sons, one share to Raushan Ara Begam, the surviving daughter of the first marriage, a married lady who died in the year 1904, but whose husband is still alive, and one-eighth share of the entire property to Fatima Begam. It is further stated that on the 1st of August, 1898, these five persons got possession of their respective shares jointly by inheritance. As that was the date of the death of the ancestor, physical possession of an undivided share being impossible, and no rent having been received by the heirs, this can only mean that they got a right to possession by virtue of the interest in his undivided share which they took by inheritance. These five heirs of the deceased Nawab then pray that after due inquiry his name might be expunged, and the names of the applicants, according to their legal shares, may be entered on the register of the zamindari Chakdari in

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

his stead. The petition purports to be signed by Sultan Mirza, Fatima Begam and Rausban Ara Begam, and is endorsed thus: "'Lochan Lal, Pleader". Upon this application an order bearing date the 30th of September, 1898, was made, purporting to be signed by the Pargana officer, to this effect: "In accordance with the reports of the tahsildar the mutation of names is sanctioned Let this be returned for compliance."

In addition to this, in the application relating to the village of Ghaila, pargana Lucknow, a consolidated statement is made by the same pleader, bearing date the 28th of September, 1898, setting forth the shares of the same several heirs to the Nawab's interest in seven villages, and the tahsildar's report, dated the 28th of September states that Nawab Zaigham-ud-Daula was a shareholder in the therein-mentioned villages, which were *muafi* (revenue-free grants); that he died on the 1st of August, 1898; that his heirs, whose names were given, were in possession in place of the deceased; that proclamation was duly issued, but the time had expired and no objection had been filed. It was therefore submitted that mutation in favour of the heirs in place of the deceased be sanctioned. The names and descriptions and shares of the five heirs are set forth, the males being described as sons of the deceased. A statement in detail of the shares in the villages is then given, and the report winds up with the following passage:—

"In the reports of the other cases a reference was made to this case. In all these cases orders for mutation were passed with reference to this case; all the cases are of the same nature"

On the same day a statement is made and signed by Chandu Prasad Patwari, setting out the same succession to the shares of the deceased in this village, to the effect following:—

"The above-named five persons (naming them) are the heirs and owners according to their legal shares, and are entitled to mutation of names Heard and admitted." And on the 7th of October, 1898, an order is made and signed by the officer in charge of the tahsil to the effect that, the case being proceeded with that day and the tahsildar's report being perused, it was ordered, in accordance with the tahsildar's report, that the

mutation slips be issued in the names of the deceased; that the fees be realized; that formal orders be issued; and that, after compliance, the files be consigned to the record room. There is nothing to show that the requirements of the Revenue Act of 1876 were not strictly complied with. In the absence of such evidence it must be assumed that they were complied with. These proceedings accordingly amount to something far more important and convincing than a mere admission by Fatima Begam of Sultan Mirza's legitimacy. They amount to the doing of an act by her by which an additional sharer in the property of the deceased is brought in and is given the right to receive portion of the income of that property, which property, if the deed were valid, belonged mainly to her and her children, and if invalid, belonged to them to a lesser extent. Further, the act was accompanied by a statement explaining it and setting forth the grounds on which it was based, namely, the heirship, as a legitimate son, of Sultan Mirza. It would appear to their Lordships that the more probable inference to be drawn from this treatment of Sultan Mirza is that it is but a continuance of the recognition and treatment he received during the life-time of the deceased Nawab, rather than an entire departure from the course previously pursued

It would be strange indeed if the ill-begotten child of a menial servant and a frail negress, never therefore owned as a son of the Nawab, or treated by him as such, should be at once selected for such an honour. Moreover, it was not a barren honour, for if Sultan Mirza speaks the truth, from the time of the mutation he and the other heirs "have been realizing their shares of the profits separately." He does not appear to have been contradicted or even cross-examined on this point and the husband of Raushan Ara Begam, who is still alive, was not produced to prove that his wife, though excluded from all further participation in her father's assets by the trust deed, did not also receive her share of the income of these zamindari villages.

On the 9th of June, 1899, Fatima Begam applied under section 10 of Act VIII of 1890, to the District Judge of Lucknow to be appointed guardian of the persons and property of her two minor sons. The application purports to be signed by her in both her

1911.

SAIDE HUSAIN KHAN v. HASHIM ALI KHAN.

capacities and by the same pleader, Lochan Lal. It contains a final passage in the usual form to the effect that she knew of her own knowledge that the entire immovable property to which the minors are entitled was of the value of 93,300 rupees, of which 60,000 rupees represent the Kothi, 13, Russell Street, Calcutta, and 15,000 rupees the property situate in the city of Lucknow, leaving a balance of 18,300 rupees as the value of the other property; that they were in possession of this property, and that their relatives are, amongst others, Hasan Mirza, brother of the minors, born of a harem of Zaigham-ul-Daula, deceased.

In the schedule to the application, also purporting to be signed by her, she sets out the shares of each of the properties contained in the trust deed belonging to the minors For instance, their share of the Kothi, 13, Russell Street, Calcutta, is put down at twelve twenty-sevenths, estimated value 60,000 rupees; whereas, under the trust deed, if valid, they would be entitled to the entire interest in this property, subject to their mother's life estate. Every item in this schedule is inconsistent with the provisions of the trust deed.

On the 12th of June, 1900, Fatima Begam made an application under section 31 of Act VIII of 1890, to the District Judge of Lucknow, for permission to mortgage the shares of the minors, together with her own share in the properties therein mentioned for the sum of 35,000 rupees, for the purpose of raising money to be applied in discharge of the judgement debts of the deceased Nawab. Two statements, A and B, were attached to this application, the first setting out the debts of the deceased Nawab, and the second, the properties of which he died seised or possessed. In the former the name of Fatima Begam appears as an encumbrancer on all the property of the deceased Nawab for the sum of 85,000 rupees, the unpaid balance of her dower. In the second, the first number is the Muchhiwali Baradari and seventy-eight shops and land situated in Chauk, City of Lucknow, the ancestor's share being four-ninths and the minor's two-ninths. The annual income is stated to be 1,500 rupees. The income arising out of the four-ninths share, 125 rupees per month and the charges upon it created by the ancestor are

put down at rupees 31,755-7-8, and its estimated value at 25,000 rupees, so that there is no beneficial interest whatever in it.

No. 15 is Machrehta, in the district of Sitapur, and No. 16 the village of Janaura, in the district of Fyzabad, in each of which the share of the deceased was four-ninths: both are stated to be included in a lease, and the estimated value of each is only 600 rupees.

No. 17 is Kothi, 13, Russell Street, Calcutta, the ancestor's share in which is stated to be 16 annas, the minor's half, the annual income 7,800 rupees, and the estimated value 55,000 rupees. The amount due upon this under Mr. Farr's mortgage is stated to be rupees 20,023-2-3, and his costs rupees 5,117-13-2 The shares of the minors are set forth, they are half their father's share. If the trust deed was valid, their share would be the entire of their father's share.

On the 26th of June, 1900, the District Judge granted permission to mortgage Nos. 2 to 14 on list B. for 16,000 rupees, as per terms of the draft mortgage filed. The shops in Lucknow, and No. 13, Russell Street, Calcutta, being therefore excluded.

The mortgage now sued upon was executed the same day. It purports to be signed by Fatima Begam on her own behalf, and as guardian of her minor sons.

Her signature is witnessed by her brother and the other witnesses, who are described as identifying her before the Registrar, and is also signed by Syed Muhammad Mirza.

The very first recital in this deed is that Zaigham-ud-Daula died a natural death in Lucknow, on the 1st of August, 1898, leaving him surviving his widow, the declarant, his two minor sons, and Nawab Sultan Mirza, his major son, and Raushan Ara Begam, his major daughter, as his heirs. It is further recited that the District Judge, under the provisions of the 31st section of the Act, VIII of 1890, ordered the declarant to contract a debt of 16,000 rupees on the security of the property of the minors; and that, in compliance with that order and with a view to raise money to pay off the amount due on a certain decree named, she mortgaged her own share in these properties.

In their Lordships' view, the only reasonable inference to be drawn from these documents and proceedings is that Fatima

1910

SADIK HUSAIN KHAN v. JASHIR ALI KHAN.

Begam, if aware of the purport and contents of this trust deed, consistently treated it as invalid, and never, with full knowledge of its purport and effect—or, indeed, at all—elected to accept the provision made by it for her and her children as a satisfaction of the unpaid balance of her dower. If she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail. If this be so, the mortgagee's rights cannot be affected, or his security invalidated, by any course of action she might have chosen to take after the execution of the mortgage. As regards the receipt of the rent or income of the property mortgaged, it must be borne in mind that Fatima Begam would have been entitled to an eighth share of it and her sons to their shares of it, even if the trust deed had never existed; and that she, as their guardian, would have been entitled to be paid their share as well as her own, while under the trust deed the trustees or she herself, with their permission, would have been entitled to receive the entire income, so that the receipt by her of a portion of the income of any of the property comprised either in the trust deed or in the mortgage might be equally consistent with her title under the deed or independent of it and therefore no proof at all of possession under it. In the mortgage deed of the 13th of September, 1902, it is recited that a lease of the Kothi, 13, Russell Street, in the city of Calcutta, was executed on the 19th of April, 1901, ten months after the date of the appellant's mortgage. The witness, Madho Lal Dagar, proves, no doubt, that he has received the rent due under this lease on behalf of the trustees since the 13th of September, 1902.

The letters from the agents of the Bank of Bengal at Lucknow to the trustees acknowledging the receipt from the branch of their bank at Calcutta of different sums to be placed to their credit range from the 21st of August, 1901 to July, 1902. It is not shown precisely what was the true nature of these lodgements in the bank at Calcutta, but from their dates and amounts and the place of lodgement the inference probably would be that they were the rents of the only property belonging to the

deceased Nawab situated in Calcutta. The evidence of Mehdi Ali Khan on this point is very unsatisfactory. He states that after the Nawab's death he was accustomed personally to bring from Hakim Safdar Husain the shares of Fatima Begam and her two sons in the profits of the *jagir* villages. He then appears to have added that he got the profits for Fatima Begam without any specification as to whose profits they were, and then, having been reminded of his former answer, he said it was true, that both answers were true. Under the trust deed Fatima Begam would have been entitled to all the income, her sons to none of it, so that this evidence is more consistent with the lady's taking against the trust deed than under it. There is no satisfactory evidence, therefore, in their Lordships' opinion, that the trustees ever entered, under and by virtue of the trust deed, into receipt of the rent or income of the property comprised in the mortgage sued upon, and consequently there is no satisfactory proof that the possession of this portion of the property, the subject of the gift, was ever delivered by the settlor to the trustees.

Even if the proof of the receipt of the rent of the Kothi, 13, Russell Street, Calcutta, were so satisfactory as to support the conclusion that possession of it had been delivered to the trustees at the date of the trust deed, or indeed at any time during the life-time of the settlor, which, in their Lordships' view, it is not, the receipt of the rent of these premises, differing altogether as they do in nature and character from the property mortgaged, separated by many miles from these *jagir* villages, and not forming with them one concrete whole, would furnish no proof whatever of the delivery by the settlor to the trustees of his shares in the villages mentioned in the mortgage. Their Lordships are, therefore, of opinion that possession of the property mortgaged not having been proved to have been delivered, the gift is, according to the Muhammadan Law applicable to the case, void, and that the mortgage sued upon is therefore a valid and a binding instrument, and a good security.

The only question remaining for consideration is the legitimacy of Sultan Mirza. The burden of proving his illegitimacy rests, according to the pleadings in the first instance at all events, on the plaintiffs in the second suit. It would appear to their

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN

Lordships that a fallacy underlies some of the arguments addressed to them on behalf of the respondents on this point. It consists in assuming that the fact, even if true, that Sultan Mirza was treated by the Nawab, and especially by his family, with less care, kindness, consideration and respect than the sons of the high-born ladies to whom the Nawab had been united by *nikka* marriages, furnishes proof of Sultan Mirza's illegitimacy. Under the Muhammadan Law, and indeed under the English Law, the legitimate son of the most low-born, debased and degraded woman to whom a man could be lawfully united has just the same proprietary right in his father's property as if his mother had been the most well-born and the purest. But it is rather against human nature to suppose that this equality before the law should secure equality of treatment in the domestic circle. It was also urged that the treatment which Sultan Mirza and his mother received in the Nawab's family was quite inconsistent with his position as the legitimate son of the Nawab, and of her position as the legitimate wife, through a *muta* marriage, of the Nawab The misfortune of that argument is that the position in the family of both Sultan Mirza and his mother, and the treatment both received, especially the latter, is still more inconsistent with her being, as the respondent alleged, the mistress of a menial servant, and he the offspring of their intercourse. Even while she was pregnant with child she was permitted privileges which it is almost impossible to believe would have been accorded to her if, her state being known, as it must have been, it was attributable to her improper intimacy with a menial servant Sultan Mirza, when he grew up, turned out to be rather a "mauvais sujet." His connection with theatres displeased the Nawab. His mother had eloped or disappeared. If he was the illegitimate son of the menial servant there was no reason why the Nawab should not have turned him adrift. On the contrary he kept him on in his (the Nawab's) home, undoubtedly associated to some extent, with him, had him about his person, and, it is apparent on the evidence had some regard for him. In their Lordships' view the reasonable inference from all the evidence on this point is that Sultan

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

Mirza was, at all events, the son of Zaigham-ud-Daula and this negress.

The crucial question then is, was he the Nawab's legitimate son? There is no question that Sultan Mirza was the son of this woman. That is admitted by all parties. Now four witnesses have proved distinctly that the Nawab acknowledged him to be his son. That *primâ facie* means his legitimate son: *Fuzeelun Beebee* v. *Omdah Beebee* (1).

The first of these witnesses, Nawab Faghfur Mirza, the son of Prince Mumtaz-ud-Daula, belonging to the family of the Kings of Oudh, states that he knew Zaigham-ud-Daula for thirty to thirty-five years, that he knew Sultan Mirza and his mother, that he saw the Nawab and Sultan Mirza treating each other like father and son, that he went to see the deceased Nawab in his last illness, and then found Sultan Mirza attending him, that the Nawab had been displeased with Sultan Mirza because the latter had become addicted to singing and dancing, but that as far as the witness could judge the Nawab had forgiven him, that fifteen or sixteen years had elapsed since then, and that the Nawab on one occasion introduced Sultan Mirza to the witness as his son. The second witness, Khan Bahadur Shujaat Ali Khan, states that Zaigham-ud-Daula told him that the negress, Sultan Mirza's mother, was his *muta* wife, that he saw Sultan Mirza visiting the family in which Raushan Ara Begam lived at Murshidabad, and that this family treated him as a son, as did also Zaigham-ud-Daula himself.

The third witness, Husain Ali Mirza, son of the Nawab Nazim of Bengal, states that Raushan Ara Begam was married to Mirza Kamyal Bakhsh, son of the late King of Oudh; that he knew Sultan Mirza; that he saw him with his father Zaigham-ud-Daula, who told the witness that Sultan Mirza was his son by a *muta* woman, and that he saw him once or twice visiting at Murshidabad during Zaigham-ud-Daula's life-time. This witness was subjected to a cross-examination, presumably considered effective, as to the time of the day at which the deceased Nawab made this statement to him. The last of these witnesses is Munshi Salig Ram. He says that one day, about fourteen or

(1) (1868) 11 B L R., 60, note; 10 W R, 469.

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

sixteen years before he gave his evidence, he, jesting, asked Zaigham-ud-Daula whence he got this boy Sultan Mirza, and he replied that he was his son by an Abyssinian, his wife by *muta*, presented to him by his, the Nawab's father, that he saw Sultan Mirza many times, and saw his father treat him as a relation, a son, or brother, and not as a servant.

The Subordinate Judge has criticized in detail the evidence in conflict with these statements, and shows conclusively, their Lordships think, that much weight cannot be attached to it.

Putting aside Sultan Mirza's own evidence, their Lordships cannot find any in the case to discredit the evidence of the four witnesses above-named. They have no interest to induce them to state what they do not believe to be true. The criticism passed upon their evidence was, first, that Sultan Mirza was only introduced to each of them once, and therefore their recollection is unreliable, as if it was to be expected that a father would naturally introduce a son to a friend as his son more than once; and, second, that they speak to what took place many years ago. They profess, however, to have a clear recollection of the events they depose to; and the Subordinate Judge, who had the advantage of seeing and hearing them believed them. Much reliance was placed upon two documents in addition to the trust deed, which, it was contended, contained a distinct repudiation by Zaigham-ud-Daula of Sultan Mirza's legitimacy, namely, the Tarikh Quisari and the memorandum bearing date the 15th of February, 1893. Both these documents were composed many years subsequent to the dates of the acknowledgements deposed to by the four witnesses mentioned. In the first he names his children by his first wife and those by Fatima Begam and states that there can be no heirs to him but these: that these persons are the owners of and heirs of his property; and that if any other claimant comes forward his claim should be considered invalid by the Government.

In the memorandum he states that one of his sons by his first marriage having died, his three sons, one daughter, and his wife Fatima, five persons in all, are his heirs, and he proceeds to declare that besides these he has none, and that if any added person comes forward as his heir, other than a son or daughter,

thereafter born to him by his wife Fatima Begam, his claim shall be considered false and unlawful.

It is quite evident from these documents that Zaigham-ud-Daula was very apprehensive that some person would come forward claiming to be his heir, else it would be meaningless and purposeless to write thus. These apprehensions and fears would have been irrational if the person whose claim he desired to defeat was the well-known progeny of the negress and a menial servant. But his fears could easily be accounted for, if in fact he had had a son by a *muta* wife whom he had treated to some extent as a son, and who by reason of that treatment might be a formidable claimant, but yet whose claims he desired, not unnaturally perhaps, to discount. Their Lordships do not think that the evidence of the four witnesses above-mentioned is rebutted or discredited by these documents.

If this be so, the rule of the Muhammadan Law applicable to the case is well established: no statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgement is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible. *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1), *Muhammad Azmat Ali Khan* v. *Lalli Begum* (2).

It is also well established according to Muhammadan law that if a member of a family, such as Fatima Begam was of her husband's family, makes statements touching the sonship or heirship of a person, such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning him. *Anjuman Ara Begam* v. *Sadik Ali Khan* (3) *Baqar Ali Khan* v. *Anjuman Ara Begam* (4).

On the whole case, therefore, their Lordships are of opinion that the decrees appealed from in these consolidated appeals

(1) (1883) I. L. R., 10 All., 262.

(2) (1881) I. L. R., 8 Calc., 422 (433). L. R., 9 I. A., 8 (18).

(3) (1899) 2 Oudh Cases, 115, 117, 123, 125.

(4) (1903) I. L. R., 25 All., 236 (247); L. R., 30 I. A., 94 (103).

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

are both erroneous and should be reversed, and the decrees of the Subordinate Judge in both should be restored, and that both appeals should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Their Lordships, however, do not think that they can, consistently with their duty as members of this appellate tribunal, part with this case without making a few observations on some remarkable features of the litigation out of which the appeals have arisen. First, as to the question of the duration of the litigation. The first suit was instituted on the 30th of April, 1907. Various applications were made by the parties for extension of time. The issues were fixed on the 26th of August, 1907. On the 19th of June, 1908, the hearing began, and judgement was delivered by the Subordinate Judge on the 25th of October, 1909, two years and five months after the institution of the suit. The petition of appeal to the Court of the Judicial Commissioner was lodged on the 28th of January, 1910, and judgement of the Court was not delivered till the 13th of November, 1911.

An application for liberty to appeal to His Majesty in Council was lodged on the 19th of December, 1911. Permission was given on the 13th of December, 1912, but the notice that it had been given was not served upon the respondents till the 23rd of January, 1913.

The petitions of appeal were lodged at the Privy Council Office on the 15th of April, 1914, but the appeals were not set down for hearing till the 27th of October, 1915, that is about eight years and six months after the institution of the suit.

The second suit was instituted on the 22nd February, 1908. The issues were settled on the 30th of March, 1908. The hearing apparently began on the 11th June, 1908, and continued at intervals till the 27th of June, 1909. It was taken up for argument early in July, 1909, was adjourned till the 21st of that month, and judgement was not delivered till the 25th of October, 1909.

The petition of appeal to the Court of the Judicial Commissioner was not lodged till the 27th of January, 1910, and judgement was not given till the 13th of December, 1911.

Such delays as these are discreditable to any judicial system, and their Lordships have no reason to think they are not to a

large extent avoidable. They vastly increase the costs, keep litigants in a state of anxious uncertainty, and prejudice their interest in many ways. Next, the cross-examination of witnesses was so unduly prolonged by the repeated asking of frivolous and irrelevant questions, that witnesses had to be re-called two or three times, often at considerable intervals, before their cross-examination was concluded, and, when re-called, the questions already asked and answered were often repeated. The cross-examination was thus broken up into several detached portions. If it were specially designed, as their Lordships are confident it was not, to expose witnesses to the risk of being tampered with, and to promote the fabrication of false evidence, no better system could be devised for that end than this spliting up of the cross-examination of witnesses.

Again, though the application to examine Fatima Begam may possibly have been rightly refused in the first instance, having regard to the time it was made, their Lordships cannot but regret that after the case had progressed, and everyone saw, as they must have seen, that it was vital to obtain her evidence, the Subordinate Judge did not announce to the parties that, he was then ready to give permission to have her evidence taken, and did not impress upon the respondents in the first suit that, as they sought to have declared void the solemn deed this lady had entered into and on the faith of which she had obtained the appellant's money, it was their duty to examine her to explain the circumstances under which she entered into it. That was not done, however. The defendants did not again apply, and the case proceeded to drag slowly on without the evidence of the witness who knew all about the facts, and whose evidence would probably have put an end to the controversy one way or another in a few hours.

Finally, their Lordships feel bound to criticize adversely a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing. By the 141st section of "The Civil Procedure Code, 1877," repeated in "The Civil Procedure Code, 1882," and practically re-enacted in Order XIII, rule 4, of the Rules and Orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall

1916

SADIK HUSAIN KHAN v. HASHIM ALI KHAN.

endorse with his own hand a statement that it (i.e. a document proved or admitted in evidence) was proved against or admitted by the person against whom it was used. That course was in many instances not followed at the hearing of these two cases, with the result that embarrassing and perplexing controversies arose on the hearing of these appeals as to whether or not certain documents, prints of which were bound up in the record, had been given in evidence. There is no possible excuse for the neglect, in this manner, of the duty imposed by the Statutes, since, so long ago as the 3rd March, 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Courts of Madras, Bombay and Allahabad, but, in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these Statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Appeals allowed.

Solicitors for the appellant: *Watkins and Hunter.*

Solicitors for the respondents: *Barrow, Rogers and Nevill.*

J. V. W.

APPELLATE CRIMINAL.

1916
May, 31

Before Mr. Justice Sunda Lal

EMPEROR v. ABDUR RAHMAN *

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 361, 366, 109—*Kidnapping from lawful guardianship—Completion of offence—Continuous offence—Abetment.*

The offence of kidnapping is completed the moment a girl under sixteen years of age is taken out of the custody of her lawful guardian and is not an offence continuing as long as the minor is kept out of such guardianship. There can be no abetment of the offence by conduct which commences only

* Criminal Appeal No 351 of 1916 from an order of J. H. Cumming, Sessions Judge of Saharanpur, dated the 28th of March, 1916.

1916

EMPEROR v. ABDUR RAHMAN

after the minor has once been completely taken out of the keeping of the guardian and the guardian's keeping of the minor is completely at an end *Regina* v. *Samia Kaundan* (1), *Queen Empress* v. *Ram Dei* (2), *Queen Empress* v. *Ram Sundar* (3), *Chekutty* v. *Emygror* (4), *Nemai Chattoraj* v. *Queen Empress* (5), *Chanda* v. *Queen-Empress* (6), referred to.

THE facts of the case are fully stated in the judgement of the Court.

Mr. *A. H C. Hamilton*, for the applicant.

Babu *Sital Prasad Ghosh* (for the Government Pleader), for the Crown

SUNDAR LAL, J.—This is an appeal against the conviction and sentence passed on the appellant under section 366, read with section 109, of the Indian Penal Code, by the Sessions Judge of Saharanpur. Along with the appellant two other persons, viz., Yusuf and Haidar Bakhsh, were put on their trial under section 366 of the Indian Penal Code; but have been acquitted by the learned Sessions Judge for reasons given in his judgement. The charge framed against the appellant by the committing Magistrate ran in the following terms, viz.

"That you on or about the 21st day of October, 1915, at Dehra Dun, instigated Haidar and Yusuf, accused, to kidnap Musammat Khatun in order that she may be forced or seduced to illicit intercourse, which offence was committed in consequence of your abetment and thereby committed an offence punishable under section 366/109 of the Indian Penal Code and within the cognizance of the Court of Session."

Musammat Khatun, whose age has been found to have been under sixteen years was, as found by the learned Sessions Judge, the wife of one Sharif Ahmad and, at the time the offence has been said to have been committed, was living with her husband at Dehra Dun The other two accused persons, viz., Haidar and Yusuf, are related to Sharif Ahmad who has stated that they are the sons of the foster brother of his father. Musammat Azizan, whose name figures in the evidence, is the wife of Haidar. Sharif Ahmad about this time was out of employment and was maintaining himself by bringing fuel or wood from the jungle for sale in the town. On the day following the Bakr Id, Sharif Ahmad left his house as usual in the morning for the jungle, and on returning

(1) (1876) I. L. R., 1 Mad., 179.
(2) (1896) I. L. R., 18 All., 350.
(3) (1895) I. L. R., 19 All., 103.
(4) (1902) I. L. R., 26 Mad., 454.
(5) (1900) I. L. R., 27 Calc., 1041
(6) Punj. Rec., 1904, Cr. J., 18.

1918

EMPEROR v. ABDUR RAHMAN.

home found that the outer door of his house was locked up and his wife away from the house. He made inquiries about her from the neighbours, but could find no trace of her for several days. I will leave Sharif Ahmad's story here and come at once to the account given by Musammat Khatun of the circumstances under which she left her husband's house. The day after the Bakr Id, at about 1. p. m. when she was alone in the house, Haidar and Yusuf came to her and told her that her brother-in-law (namely, her sister's husband) had come and had called her as her sister was very ill. Abdur Rahman is the name of the brother-in-law. He is, however, a person other than Abdur Rahman the accused, who is a stranger, and not related to the family of Musammat Khatun in any away. She demurred to going before the return of her husband, but on being pressed to do so by Haidar and Yusuf, she left with them after locking the outer door of her house and followed them to their house. There she did not find her sister's husband who, she was told, was coming by the evening train, she asked them to escort her back to her husband's house. They said they had then to go to the bungalow of the person in whose service they were, and that they would convey her back in the evening to her house and they left her in the house.

A little while after Abdur Rahman, the accused, came in, whereupon she went into the house as he was stranger. Abdur Rahman entered into conversation with Azizan and Imaman (who is the mother-in-law of Haidar), and he left them shortly afterwards, telling Azizan to come to his house as his wife was very ill. Azizan did not go and Abdur Rahman came back to summon her to go to his wife. At his request Azizan decided to go. She also induced Musammat Khatun to go with her, after she had promised to take her from there to her husband's house. The two women followed Abdur Rahman to his house and sat there for some time, when Azizan went out on some pretence and Khatun and Abdur Rahman were left alone in the place. Abdur Rahman locked the doors from inside and according to Musammat Khatun, had sexual intercourse with her by force. He refused to let her go back, and according to Musammat Khatun, is said to have told her that he had paid a lot of money to Azizan and Haidar and that he would let her go back if she gave back the

1916

EMPEROR v. ABDUR RAHMAN.

money. She was found a few days later by the police in the house of Abdur Rahman, concealed inside a box, over which were placed a couple of other boxes in a room in the house. Upon these facts the three accused persons were put on their trial. I am not concerned with the reasons given for the acquittal of the other two accused persons, for there is no appeal against their acquittal by the Local Government. The only question in appeal before me is whether the appellant has been rightly convicted of the offence charged, viz., abetment of the offence described in section 366 of the Indian Penal Code. Under section 361 of the Indian Penal Code "whoever *takes* or *entices* any minor . . . if a female under sixteen years of age . . . out of the keeping of the lawful guardian of such minor . . . without the consent of such gurdian is said to kidnap such minor . . . from lawful guardianship." Where such kidnapping of any woman is with the intent that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, the offence comes within the purview of section 366 of the Indian Penal Code.

The question whether the offence of kidnapping is completed the moment the girl is taken out of the custody of her lawful guardian, or is a continuing offence until she returns back to her guardian has been the subject of consideration in several recent cases. In *Nemai Chattoraj* v. *Queen-Empress* (1), a Full Bench of the Calcutta High Court (RAMPINI, J., dissenting) held that the offence was not a continuing one, but became complete the moment the girl was taken, or enticed out of the custody of her lawful guardian. The only case in support of the contrary view is that of *Regina* v. *Samia Kaundan* (2), in which the accused was charged with the offence of kidnapping a minor out of British India. In that case the offence was not completed until the minor crossed the limits of British India. This case was referred to in two cases of this Court, viz., *Queen-Empress* v. *Ram Dei* (3) and *Queen-Empress* v. *Ram Sundar* (4) and not followed. The judgement of this Court is on the same lines as the judgement of the Full Bench of the Calcutta Court already referred

(1) (1900) I. L. R., 27 Calc., 1041. (3) (1895) I. L. R., 18 All., 350

(2) (1876) I. L. R., 1 Mad., 173. (4) (1896) I. L. R., 19 All., 109.

1916

EMPEROR v. ABDUR RAHMAN.

to. In a later case in the Madras Court, *Chekutty* v. *Emperor* (1), the Chief Justice Sir ARNOLD WHITE observed as follows:—"In support of the conviction it was argued that the offence of kidnapping was continuous and that the assault on the mother having been committed during the continuance of the kidnapping the two offences were committed in one series of acts so connected together as to form the same transaction. It has recently been held by a Full Bench of the Calcutta High Court in *Nemai Chattoraj* v. *Queen-Empress* (2), that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship and that it is not an offence continuing as long as the minor is kept out of such guardianship". The case in I. L. R., 1 Mad., 173, was distinguished on the ground I have already indicated. In a very similar case which came up before the Punjab Chief Court, Sir MEREDYTH PLOWDEN and Mr. Justice ROE held that "speaking generally, the keeping of the guardian came to an end when the person of the minor had been transferred from the custody of the guardian, or some person on his behalf, in the custody of some person not entitled to the custody of the minor." They further observed, at page 21:—"But there can be no abetment of taking by conduct which commences only after the minor has once been completely taken out of the keeping of the guardian, and the guardian's keeping of the minor is completely at an end. Whether the taking was or was not complete is a question for determination with reference to the circumstances proved in the particular case"; *Chanda* v. *Queen-Empress* (3).

I have now to see whether on the evidence it has been proved that Abdur Rahman instigated the kidnapping of Musammat Khatun.

[His Lordship then dealt with the evidence.]

Upon the evidence on the record therefore abetment of kidnapping has not been proved against the appellant, and the conviction therefore must be set aside. Whether the appellant is guilty of any other offence for which he has not been charged is not a matter for me to consider here. All that I have to see is

(1) (1902) I. L. R., 26 Mad., 414. (2) (1900) I. L. R., 27 Calc., 1041.

(3) Punj. Rec., 1904, Cr. J., 19.

whether the offence of abetment of kidnapping has been proved. I hold that there is no evidence to prove the offence charged. I accordingly allow the appeal, set aside the conviction and the sentence and direct that the appellant be released at once.

1916

EMPEROR v. ABDUR RAHMAN.

Appeal allowed.

APPELLATE CIVIL.

1916
June, 2.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal

SHEO SHANKAR AND OTHERS (DECREE-HOLDERS) *v.* CHUNNI LAL AND OTHERS (JUDGEMENT-DEBTORS)*

Civil Procedure Code, 1908, *order XXI, rule* 18—*Cross decrees—Set-off—Decree for sale on mortgage against purchaser of portion of the mortgaged property—Personal decree for money—Parties not filling the same character.*

A person against whom a decree foreclosing his right to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgement-debtor by the arrest of his person and the attachment of his property. In the one case he has obtained his decree for costs in his individual and personal capacity. In the other he is not ordered to pay any sum of money in his individual and personal capacity, but is only given an option to do so if he likes to save from sale some property in which he is interested. In such circumstances, therefore, rule 18 of order XXI of the Code of Civil Procedure will not be applicable. *Nagar Mal* v. *Ram Chand* (1) distinguished.

THE facts of the case for the purposes of this report are briefly as follows :—

Sheo Shankar obtained two decrees against Chunni Lal. Chunni Lal obtained three decrees for sale on the basis of three mortgages against a number of persons, among whom was Sheo Shankar, who had been impleaded as purchaser of a very small share of the mortgaged property. Sheo Shankar applied for the execution of his decrees against Chunni Lal. Chunni Lal pleaded that the amount of his three decrees should be set off against Sheo Shankar's decrees. Sheo Shankar objected to this on the ground that his character as decree-holder was quite different from his character as judgement-debtor in the decree for

* First Appeal No. 236 of 1915, from a decree of I. B. Mundle, Subordinate Judge of Jaunpur, dated the 20th of April, 1915.

(1) (1911) I. L. R., 33 All., 240.

1916

SHEO SHANKAR v. CHUNNI LAL.

sale. The Subordinate Judge overruled the objection of Sheo Shankar.

Sheo Shankar appealed.

Dr. *S. M. Sulaiman*, for the appellant :—

Sheo Shankar was made a defendant in the suit of Chunni Lal merely as purchaser of the mortgaged property and not in his personal capacity. The decree-holder has his remedy against the property and the property only. He has no rights against Sheo Shankar's person or his other property. Sheo Shankar was merely impleaded as defendant so that he might have an opportunity of redeeming the property and not because he was liable to pay. Moreover, the portion of the mortgaged property which the appellant holds is very insignificant, and he does not care to redeem it. The appellant was not bound to satisfy the decree for sale. On the other hand, the decrees that he has obtained against Chunni Lal are personal decrees for the payment of money. In the case in which we are the decree-holders, Chunni Lal is personally liable to pay on his own account, while in the decree in which the appellant is the judgement-debtor he has been impleaded as successor in interest of his transferors, the original mortgagors. The two capacities are quite different.

Mr. *B. E. O'Conor*, for the respondent :—

All that a court has to see under order XXI, rule 16, is that the decree-holder in one case is the judgement-debtor in the other and *vice versa*. Rule 18 makes no distinction between a simple money decree and a mortgage decree. The case of *Nagar Mal* v. *Ram Chand* (1) makes no distinction between a mortgage decree and a simple money decree.

Dr. *S. M. Sulaiman*, for the appellant, was not heard in reply.

SUNDAR LAL, J.—These appeals arise out of orders passed by the court below under order XXI, rule 18, of the Code of Civil Procedure. It appears that three suits were filed in the court of the Subordinate Judge of Jaunpur to which the parties or most of them were impleaded either as plaintiffs or defendants. The first of these was filed by seven plaintiffs, viz., (1) Jamuna

(1) (1911) I. L. R., 33 All., 240.

Prasad (2) Chunni Lal, (3) Lachmi Narain, (4) Bhagwan Das, (5) Persotam Das (6) Jairam Das and (7) Sheo Prasad against nine defendants viz.—(1) Changur Khan, (2) Sheo Shankar, (3) Haridas (4) Rai Rajnath, (5) Bhola Nath, (6) Raghunath Das, (7) Muluk Das, (8) Rameshwar Das and (9) Jageshar Das.

The suit was for sale on a mortgage which the defendants pleaded was paid off and discharged.

The learned Subordinate Judge of Jaunpur dismissed the suit with costs, amounting to Rs. 365, awarded to defendants Nos. 2 to 4 and Nos. 6 to 9. The plaintiff appealed against the said decree to this Court, and on the 17th of September, 1910, the learned Chief Justice (Sir JOHN STANLEY) and Mr. Justice BANERJI dismissed the appeal with costs in favour of the defendants amounting to Rs. 468-9-9, for the High Court, and affirmed the decree of the court below.

The second suit was by Sheo Shankar and others (the eight persons who were defendants Nos 2 to 9 in the suit mentioned in the preceding paragraph) against Jamuna and others (the seven plaintiffs of that suit.)

The suit was for possession of certain properties with mesne profits. On the 6th of March, 1911, STANLEY, C. J., and BANERJI, J., decreed the said suit with costs and awarded future mesne profits, the amount of which was to be ascertained in the execution department. Apart from the question of mesne profits, the amount of which remains still unascertained, Sheo Shankar and others in these cases obtained against Jumna Prasad and others a decree awarding them, or some of them, costs of the suits (in the amounts as shown in these decrees.)

These two decrees may be described as decrees of the first set.

The last suit was one instituted by Jamuna Prasad and the same seven persons, who were plaintiffs in the first mentioned suit, on foot of three mortgages, dated the 22nd of February, 1889, 30th of October, 1889, and 9th of September, 1893, for sale of the property mortgaged. The first three defendants were the heirs of the mortgagors; the fourth defendant was a prior mortgagee. Defendants Nos. 5 to 12 were Sheo Shankar and others (who are named as defendants Nos. 2 to 9 in the suit first mentioned) who had purchased a considerable part of the mortgaged property, and who

1916

SHEO SHANKAR v. CHUNNI LAL.

were impleaded as such purchasers. The last two defendants (Nos 13 and 14) were puisne mortgagees of a part of the property mortgaged. The suit was decreed by the court of first instance on the 17th of April, 1909, and the decree was upheld by the court in appeal on the 23rd of April, 1910. The decree was for the sale of the mortgaged property. This decree has been put in execution as also the two decrees of the first set. In execution of the decrees of the first set in which the proceedings for execution were initiated by Sheo Shankar, Raghunath Das and Rameshwar Das, the property of Jamuna Das and others was attached and put up for sale.

Chunni Lal, Bhagwan Das and Lachmi Narain, three of the decree-holders of the decree for sale, have applied to the court below to set off the amounts of the decrees of the first set against the amount of the third decree (i.e., the decree for sale) under rule 18, order XXI, of the Code, and their prayer has been granted. It is against this order that the three appeals (one in the case of each decree) have been preferred. The case for the appellants is that they were made defendants to the decree for sale in their capacity as purchasers of some of the mortgaged property. They were not liable personally for the amount of the decree. They were impleaded to foreclose their right of redemption as transferees of the mortgaged property which was of a much smaller value than the amount of the decree for sale or even the decrees for costs obtained by them. It was to give them the opportunity of saving the property purchased by them from sale if they chose to avail themselves of the option thus given to them that they were impleaded; they were not bound to pay up the decree in question. It was only in their character as purchasers of some of the mortgaged parcels that they had been impleaded in that suit. They do not propose to save the property so purchased by them from sale, but prefer to leave it to the decree-holders to bring them to sale, and to recover what they can of the amount of their decree for sale.

On the other hand, the amounts awarded to them by the two decrees for costs are personally recoverable from Jamuna Prasad and others. They would prefer to recover the amounts due to them on their decrees and have the property purchased by them

to be sold for what it may be worth. If the property purchased by them is of very small value, and indeed much smaller in value than the amount of costs awarded to them, it is obviously to their advantage to repel the proposal to set off their decrees for costs, as prayed for the respondents, and the question in appeal is whether they can successfully repel the proposal. The answer to the question depends upon the interpretation to be placed on rules 18 and 20 of order XXI of the Code Clause (1) of rule 18 aforesaid enacts that where two cross-decrees in separate suits "for the payment of sums of money" passed between the same parties are in execution in the same court, the court shall record satisfaction of the decree for the smaller amount, and also record payment of that amount against the amount due on the decree for the larger sum, and issue execution for the balance only. Prior to the passing of Act V of 1908, the present Code of Civil Procedure, it had been held that a decree for sale is not a decree for payment of money within the meaning of sections 230 and 246 of the Code of Civil Procedure This point has been cleared up by rule 20 of this order. The provisions of rules 18 and 19 apply now to decrees for sale as well. Rule 20, however, does nothing more than make the provisions contained in rules 18 and 19, applicable to decrees for sale. The two decrees proposed to be set off against each other must come within the provisions of these rules before they can be so set off.

Rule 18 of order XXI of the Code now in force corresponds to section 246 of the old Code. Explanation III of that section enacted that the section in question did not apply unless "the decree-holder in one of the suits in which the decrees have been made is judgement-debtor in the other and each party fills the same character in both suits." The same rule has been enacted in the Code now in force, and finds place in clause (3) of rule 18 of order XXI. The question in the case is, do the judgement-debtors appellants, in the decree for sale on the mortgage, fill the same character as they do in their capacity as holders of the decrees of the first set for costs, which are sought to be set off against the decree on the mortgage?

To determine this point it is necessary to consider what character the defendants appellants fill in the decree for sale on the

1916

SHEO SHANKAR v. CHUNNI LAL.

mortgage. In a suit for sale on a mortgage under rule 1, order XXXIV, "All persons having" an interest either in the "mortgage security, or in the right of redemption shall be joined as parties" under section 91 of the Transfer of Property Act, 1882, besides the mortgagor any one of the following persons may institute a suit for redemption, viz.:—

"(a) Any person (other than the mortgagee of the interest sought to be redeemed) having an interest in or charge upon the property.

"(b) Any person having an interest in or charge upon the right to redeem the property.

"(f) The judgement-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property,

"(g) A creditor of the mortgagee who has in suit for the administration of the estate obtained a decree for sale of the mortgaged property"

By the combined operation of these two provisions a person who is a puisne mortgagee of a part only of the mortgaged property but whose puisne mortgage comprises numerous other properties more than sufficient to meet his claim on the plaintiff's mortgage has to be made a party defendant. He may not care at all to redeem the small bit of his mortgaged property comprised in plaintiff's mortgage, and be content to realize his mortgage money from the other property mortgaged to him. An attaching creditor under section 91 (*f*) of the Act may be in a similar position. He may not care to redeem the small portion attached by him and may prefer to rely upon other property owned by the debtor for realizing his debt Similarly a transferee of a portion of the mortgaged property (or even of the whole of the mortgaged property) may prefer to let the property be sold. The question is, do persons impleaded as such who are not liable on the contract of mortgage (being no parties to it) but who are impleaded to foreclose their rights of redemption "fill the same character" as that in which they obtained the decrees themselves for costs, sought to be set off?

"Apart from agreement, all rights of set-off are purely the creation of statute or rules of court" (Lord HALSBURY'S Laws of England, Vol. 25, page 485). The statutes of set-off were construed strictly by courts of Common Law (*Ibid*, page 486). Under rule 3 of order IX of the Rules of the Supreme Court of 1883,

1916

SHEO SHANKAR v. CHUNNI LAL

the Judge may if "such set-off or counter claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." In this country, however, the practice of recording satisfaction of one decree and part satisfaction of the other and issuing execution for the balance is governed entirely by rule 18 of order XXI.

Our Code is, however, imperative on this point, and the court is bound to give effect to the plea provided the conditions prescribed by the rule are fulfilled. If the contention for the respondent be correct, a person impleaded merely in the character of a person who has purchased or attached a portion of the mortgaged property or who holds a puisne mortgage over a portion of such property is compelled to set off against any decree for a debt obtained by him personally against his opposite party, which he was entitled to recover personally from his debtor. He is thus compelled to pay a debt, which he is not personally bound to pay and for the payment of which he is under no personal obligation. He is compelled to save from sale property which he does not care to save and which he is not bound to save from sale. In my opinion a person against whom a decree foreclosing his right to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor, is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgement-debtor by the arrest of his person and the attachment of his property. In the one case he has obtained his decree for costs in his individual and personal capacity. In the other he is not ordered to pay any sum of money in his individual and personal capacity, but is only given an option to do so if he likes, to save from sale some property in which he is interested.

It was suggested in course of the argument that if the property in which the appellant is interested as a puisne transferee of a very small value the equities of the case might be met by setting off only the value of the property in which the appellant was interested. If both parties were agreed as to the value of such property the ascertainment of the amount to be set off presents no difficulty. Rule 18 of the Code, however, contemplates no

1916

SHEO SHANKAR v. CHUNNI LAL.

inquiries when the point is disputed. The sums are ascertained and fixed by the decrees; all that rule 18 contemplates is the mechanical process of setting off one against the other.

Reliance has been placed on the case of *Nupar Mal* v. *Ram Chand* (1). In that case a decree for money was set off against a decree for sale by the court below. The holders of the money decree applied to this Court for the revision of the said order. The judgement-debtors in the decree for sale were not impleaded in that suit in a capacity different from that in which they had obtained their decree for money. The Court (KNOX and KARAMAT HUSAIN, JJ.) in that case saw no reason for interference in revision. In this case the character in which the defendants were sued in the case on the mortgage is different from the character in which they obtained their decrees for money. For these reasons I would decree the appeal and set aside the order made by the court below with costs.

WALSH, J.—I entirely agree with the judgement of my brother Sundar Lal.

Appeal allowed and cause remanded.

Before Mr Justice Walsh and Mr. Justice Sundar Lal.

1916

June, 30.

NIADAR SINGH (DEFENDANT) v. GANGA DEI (PLAINTIFF.)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 62.—Suit for money taken in execution of a decree—Compensation—Suit for money had and received.

In execution of a decree certain rents due to the judgement-debtor from his tenants were attached. Prior to the passing of the decree the judgement-debtor had sold the property to a third party. The decree-holder got the court *amin* to realise the rents due from the tenants, and they were deposited in Court and ultimately paid over to the decree-holder. The purchaser brought the present suit against the decree-holder for the recovery of the money. *Held* that the suit was for money had and received within the meaning of article 62 of schedule I to the Indian Limitation Act. *Jagjiwan Javherdas* v. *Gulam Jilani Chaudhri* (2) dissented from.

THE facts of this case were as follows:—

In 1911, the plaintiff respondent purchased at auction zamindari property belonging to one Jangi. She obtained formal possession from court in May, 1912. The defendant appellant obtained a decree against Jangi and in execution of that decree

* First Appeal No. 89 of 1916, from an order of Ramgopal, Subordinate Judge of Meerut, dated the 7th of December, 1915.

(1) (1911) I. L. R., 33 All., 240. (2) (1883) I. L. R., 8 Bom., 17.

1916

NIADAR SINGH v. GANGA DEI.

the court Amin went and realized from the tenants the rent due to the zamindar of the land the ownership of which had then passed to the respondent. The rent so realized was deposited in court and paid over by the court to the decree-holder (the defendant appellant) in August, 1912. The respondent sued the appellant for the recovery of the amount claiming interest thereon as damages in August, 1915, within three years of the date of payment by the court to the appellant. The Munsif held that article 29 of the Indian Limitation Act, 1908, applied to the case and dismissed the suit as barred by limitation. The learned District Judge held that the case was governed by article 62 of the Limitation Act and remanded the case for trial on the merits. The defendant appealed to the High Court.

Babu *Harendra Krishna Mukerji*, for the appellant:—

The Munsif was right in dismissing the suit. The money was brought into court and paid to the defendants in August, 1912. The plaintiff claims, not the actual coins but compensation for wrongful seizure. The money obtained by the defendant appellant was movable property. It was seized by process of law. We had an attachment order in our favour. The Amin went on the strength of this attachment order and obtained money from the tenants. This amounts to seizure and the case is governed by article 29 of the Limitation Act; *Jajiwan Javherdas* v *Gulam Jilani Chaudhri* (1). He submitted that (1) the plaintiff could not claim the return of the identical coins which the defendants took away. Further, in his plaint he claims interest as damages, which is an equivalent term for compensation. (2) The seizure was certainly wrongful, the defendant attached the property not of his judgement-debtor but of a third party. It is not a case of money had and received, as the money was removed by the defendant from the court not for the plaintiff's use but for his own use. Article 62 applies when the defendant obtains the money by deceit or fraud and not when he takes it asserting a title thereto; *Vellammal* v. *Ayyappa* (2).

Pandit *Mohan Lal Sandal*, for the respondent, was not called upon.

(1) (1883) I.L.R., 8 Bom., 17. (2) (1912) 23 M.L.J., 513.

1916

NIADAR SINGH v. GANGA DEI.

WALSH, J.—This case has been thoroughly argued But really the point is hardly open to discussion The plaintiff sues to recover from the defendant certain money which has been received by the defendant, in the form of rent paid to the defendant through the court under a decree entitling the defendant to receive such rent as against the tenants, but in respect of property of which the plaintiff was entitled to the possession, and also to the receipt of the rents It is suggested that for such an action the Limitation Act provides one year's limitation by reason of the terms of article 29, that is to say, that it is an action for compensation for wrongful seizure of movable property under legal process. It is nothing of the kind. The moment one appreciates the distinction between tort and contract all difficulty disappears. Assuming for a moment that such money can be movable property, it is obvious that it has never been in the possession of the plaintiff at all. Compensation for wrongful seizure is another way of stating a claim for damages for tort in *detinue* or trespass. There can only be wrongful seizure when the property was in the possession of the person who is setting up the wrong An action for *detinue* involves the proof of a right to actual possession, and of a deprivation of possession In the case now before the court there was no seizure; there is no tort, that is to say, there is nothing wrongful in the sense in which it is used in the article; there is no claim for compensation, and I very much doubt whether rents payable under these circumstances are movable property at all. It is quite clear that money received by B from a third person, to which A is rightfully entitled, is money which, from the date of its receipt by B, B is under an implied contract to pay to A. The cause of action which A has for that implied contract has always been known to the common law as an action for money had and received by the defendant to the use of the plaintiff. That is what the present suit is really for, and article 62 of the first schedule to the Limitation Act is the appropriate article. I think the case of *Jayjivan Javherdas* v. *Gulam Jilani Chaudhri* (1) was wrongly decided.

(1) (1868) I. L. R., 8 Bom., 1.

The appeal must be dismissed with costs. 1916

SUNDAR LAL, J.—I am of the same opinion.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

NIADAR SINGH v. GANGA DEI.

Before Mr. Justice Piggott and Mr. Justice Lindsay. 1916

KANHAIYA LAL AND OTHERS (DEFENDANTS) v. KISHORI LAL AND ANOTHER (PLAINTIFFS) AND DULI CHAND (DEFENDANT).* *June, 5.*

Hindu Law—Hindu widow—Effect of compromise entered into by a Hindu widow with a limited estate—Rights of reversioners.

A Hindu widow in possession as such of her husband's estate brought a suit for possession of two shops on the allegation that they formed part of her husband's estate. The suit was compromised, the effect of which was that the widow recognized the defendants as full proprietors and they, on the other hand, had to pay a certain sum of money. To raise this money they mortgaged the two shops. The mortgagee brought a suit for sale and the shops were purchased by H., at the auction sale. After the death of the widow the reversioners of her deceased husband brought a suit to recover possession of the aforesaid shops

Held, that a compromise entered into by a Hindu widow with a limited estate, resulting in the alienation of property forming part of her husband's estate, cannot bind the reversioners, unless it is shown that it was for such purposes as would justify a sale by a Hindu widow—*Imrit Konwar* v. *Roop Narain Singh* (1), *Musammat Raj Kunwar* alias *Sheo Murat Koer* v. *Musammat Inderjit Kunwar* (2), *Rajlakshmi Dasee* v. *Kalyanam Dasee* (3), *Khunni Lal* v. *Gobind Krishna Narain* (4), *Mahadei* v. *Baldeo* (5) and *Bihari Lal* v. *Daud Husain* (6), referred to

THE facts of this case were as follows:—

Kunj Lal and Duli Chand were in possession of a certain shop. They were sued for rent by Musammat Lachcho, widow of Dwarka Das, who alleged that the shop had belonged to her husband. The suit was dismissed by the appellate court in 1894. After that, in October, 1894, Musammat Lachcho together with her alleged adopted son Chunni Lal brought a suit against them for possession. That suit was compromised on the 9th of April, 1895, on the terms that if the defendants deposited Rs. 1,500 within six months they should be considered to be in proprietary

* First Appeal No. 379 of 1914, from a decree of Babu Bihari Lal, Subordinate Judge of Aligarh, dated the 10th of July, 1914.

(1) (1880) 6 C. L. R., 76.
(2) (1870) 5 B. L. R., 585.
(3) (1910) I. L. R., 38 Calc., 639.
(4) (1911) I. L. R., 33 All., 356.
(5) (1907) I. L. R., 30 All., 75
(6) (1913) I. L. R., 35 All. 240.

1916

KANHAIYA LAL v. KISHORI LAL.

possession from that date, otherwise the suit would be decreed. To raise this amount as well as for other purposes Kunj Lal and Duli Chand hypothecated, on the 7th of October, 1895, the shop in favour of Kundan Lal, and left Rs 1,500, with the mortgagee for deposit in court. The amount was duly put in. Kundan Lal sued to enforce his mortgage against Kunj Lal and Duli Chand, the suit was decreed on the 19th of November, 1900; in execution of the decree the shop was sold by auction and purchased by Harmukh Rai in 1901. Harmukh Rai obtained possession.

In the meantime, on the 29th of September, 1899, Kishori Lal, reversioner of Musammat Lachcho, brought a suit for a declaration that Chunni Lal's adoption was invalid and a declaration that all transfers which had been made by Chunni Lal and Musammat Lachcho would be inoperative after the death of Musammat Lachcho. Kunj Lal and Duli Chand were also made defendants to the suit, and the transfer of the shop in their favour by virtue of the compromise decree was included in the list of transfers sought to be set aside. This suit was decreed on the 11th of February, 1902; the decree was reversed by the High Court but restored by the Privy Council on the 15th of December, 1908. Kundan Lal was never made a party to this litigation.

Musammat Lachcho died in 1904. In 1913, a suit was brought by Kishori Lal and another for declaration of ownership and for possession of the shop and for recovery of mesne profits against the heirs of Harmukh Rai and others, on the ground that the auction purchase was of no effect. This suit was decreed. The heirs of Harmukh Rai appealed.

Munshi *Panna Lal*, (with him The Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Girdhari Lal Agarwala*), for the appellants:—

The first suit for rent was brought against Kunj Lal and Duli Chand by Musammat Lachcho as representing the estate of her deceased husband. She obtained a decree from the first court, and it was in appeal that she lost the suit. It must be taken, therefore, that the suit was fully and fairly prosecuted by her. It is not shown that there was any fraud or collusion. The judgement in the rent suit which was obtained against

the widow in her representative character without fraud or collusion and after full contest is binding upon the estate and the plaintiffs cannot go behind it and question the title of Kunj Lal and Duli Chand, the predecessors in title of the appellants. In the view that Kunj Lal and Duli Chand did not acquire title to the shop from the dismissal of the rent suit, they did so as the result of the compromise decree The compromise was a reasonable settlement of doubtful and disputed rights. Musammat Lachcho had no documentary evidence to support her alleged title to the shop; the defendants had been long in possession of it; and the former suit had been lost by her. Under these circumstances she acted wisely in entering into the compromise and making the best of a bad situation. Such a compromise is binding upon the reversioners, especially where the property has subsequently changed hands; *Bihari Lal* v. *Daud Husain*, (1) and *Khunni Lal* v. *Govind Krishna Narain* (2) The plaintiffs in attacking the compromise forget that but for it there was every likelihood of Musammat Lachcho's suit for possession being dismissed, with the result that the shop would have been absolutely lost to the estate of Dwarka Das. The decree in Kishori Lal's suit is not binding upon the appellants. Neither Kundan Lal nor Harmukh Rai was a party to that suit The fact that Kunj Lal and Duli Chand were made parties does not help the plaintiffs, for, a decree obtained against the mortgagors of the mortgage does not affect the rights of the mortgagee; *Sita Ram* v. *Amir Begam* (3) and *Soshi Bhusan Guha* v. *Gogan Chunder Shaha* (4) Kundan Lal, therefore, was not bound by that decree, nor was Harmukh Rai bound; he, as auction-purchaser in execution of a mortgage decree, represented the interests of the decree-holder Kundan Lal. Harmukh Rai was a *bonâ fide* purchaser for value and as such acquired a good title.

Munshi *Gokul Prasad*, (with him Mr. *B. E. O'Conor*), for the respondents :—

The dismissal of Musammat Lachcho's suit for arrears of rent did not confer any title upon Kunj Lal and Duli Chand.

(1) (1918) I. L. R., 35 All., 240 (3) (1886) I. L. R., 8 All., 324.

(2) (1911) I.L. R., 33 All., 356. (4) (1894) I. L. R., 22 Calc., 364.

1916

KANHAIYA LAL v. KISHORI LAL.

No question of title was decided in that suit. It failed for want of proof of the contract of tenancy alleged by her. The compromise decree relied upon by the appellants is not binding upon the reversioners. A Hindu widow, who is a qualified owner, cannot be party to a consent decree so as to bind the inheritance in the hands of the reversioners. It is only a decree obtained against the widow after full and fair contest that can have such an effect; *Imrit Konwar* v. *Roop Narain Singh* (1), *Rajlakshmi Dasee* v *Katyayani Dasee* (2), *Gobind Krishna Narain* v. *Khunni Lal* (3) and *Mahadei* v. *Baldeo* (4). The cases relied on by the appellants are cases of family settlements, in which class of cases different considerations arise. The effect of the compromise decree was merely to create in favour of Kunj Lal and Dub Chand an alienation of the shop by Musammat Lachcho. In the absence of proof of legal necessity the alienation by the widow passed no more than her own limited interest and ceased to be operative after her death; *Musammat Raj Kunwar* v. *Musammat Inderjit Kunwar* (5). The dismissal of the suit for rent in no way jeopardized the title of Musammat Lachcho; there is no justification for supposing that her suit for possession was likely to be dismissed. On the other hand, the compromise in fact recognized her title. She was acting in bad faith in securing Rs. 1,500 for her own pocket by parting with her husband's property.

Munshi *Panna Lal*, was heard in reply.

PIGOTT, and LINDSAY, JJ.:—This is a litigation in respect of two shops in the town of Hathras. There were three sets of defendants originally impleaded, but we are really concerned only with the case as between the plaintiffs and the first set of defendants, namely Kanhaiya Lal and two members of his family. The suit related to two adjoining shops which may conveniently be spoken of as shop No. 1 and shop No. 2. The plaintiffs admitted that the defendants of the first party were in actual occupation of the shops, but alleged them to be in occupation of both shops as tenants. With regard to shop No. 1, these

(1) (1880) 6 C. L. R., 75. (3) (1907) I. L. R., 29 All., 487

(2) (1910) I. L. R., 38 Calc., 689. (4) (1908) I. L. R., 30 All., 75.

(5) (1870) 5 B. L. R., 585

1916

KANHAIYA LAL v. KISHORI LAL

defendants admitted the plaintiff's title. They pleaded that they had as a matter of fact paid the rent due from them to date and so denied the plaintiff's right to any relief in respect of this particular shop. We are concerned, so far as the appeal before us goes, only with the question at issue between the parties about shop No. 2. The title of the plaintiffs in respect of this shop is simple. They are the reversioners of one Bobra Dwarka Das, who died in or about the year 1854 A. D. leaving him surviving two widows. One of those widows, Musammat Lachcho, survived the other and continued to represent the estate of her husband up to the time of her death in 1904. The title of Kanhaiya Lal and his co-defendants in respect of the shop in question may be set forth in this way. Harmukh Rai, father of Kanhaiya Lal, purchased this shop at auction on the 24th of July, 1901. The sale was held on a decree, dated the 29th of November, 1900, in a suit brought by one Kundan Lal against Kunj Lal and Duli Chand. These persons had made a mortgage of this shop in favour of Kundan Lal on the 7th of October, 1895. There can be no doubt that Harmukh Rai as auction purchaser thereby acquired the right, title and interest of Kunj Lal and Duli Chand in this shop No. 2. The question really in issue is what that title was. The court below has found in favour of the plaintiffs on the question of title and has overruled all the objections taken by the contesting defendants, except with regard to the alleged payment of rent on account of shop No. 1. The appeal of Kanhaiya Lal and his co-defendants is against the decree of the court below awarding to the plaintiffs possession of shop No. 2 with mesne profits. There are seven paragraphs in the memorandum of appeal to this Court. The first and the seventh of these are argumentative and general. The points taken in the remaining paragraphs are substantially four. (1) It is contended that the plaintiffs have failed to prove their title as owners of the shop in question. (2) It is pleaded that there is some bar of limitation against the plaintiffs' suit. (3) It is contended that the ownership of the shop in question had passed to Kunj Lal and Duli Chand, through whom the plaintiffs derived their title, by reason of valid transfers under circumstances to be presently considered. (4) It is pleaded that the position of the

1916

KANHAIYA LAL v. KISHORI LAL,

defendants appellants is that of *bona fide* purchasers for value and that in any case they are entitled to be compensated for expenditure incurred by them upon improvements. We may take up these points in order.

[The judgement then proceeded to discuss the evidence.]

The whole of this evidence taken together seems to be quite sufficient to prove that Dwarka Das was the owner of shop No. 2 and to justify the inference that he continued to be the owner of the same up to the time of his death and was succeeded by his widow Musammat Lacheho.

This of course is subject to a finding in favour of the plaintiffs on the question of limitation.

[The judgement again proceeded to discuss the evidence.]

We therefore find that the plaintiffs have proved their title, and we are satisfied that they have brought their suit within limitation.

We now come to consider the most important issue in the case, namely the question whether Kunj Lal and Duli Chand had acquired a good title to this shop under a certain compromise decree, dated the 9th of April, 1895. We have already referred incidentally to the fact that one Chunni Lal claimed the estate of Dwarka Das as his adopted son. There was prolonged and complicated litigation before the claim of Chunni Lal was disposed of and this question was definitely decided against Chunni Lal by their Lordships of the Privy Council on the 15th of December, 1908, when they disposed of certain consolidated appeals then pending before them arising out of previous litigation in this country. There is no question of the rights of Chunni Lal arising in the suit now before us. The matter is referred to by us only to explain the previous army of Chunni Lal as a co-plaintiff with Musammat Lacheho in a litigation which we are called on to consider. It would seem that during the year 1892, there was friction between Musammat Lacheho and Kunj Lal and Duli Chand, who were then occupiers of this shop No. 2. Musammat Lacheho brought a suit in her own name to recover certain money as arrears of rent for this shop. This suit was decreed by the court of first instance on the 15th November, 1893, but was dismissed on the 7th of June, 1894.

by the court of first appeal. We find from documentary evidence on this record that this dismissal had nothing to do with any claim of Chunni Lal, or with any doubt as to the proprietary title of Musammat Lachcho. The claim for rent was dismissed simply on the finding that Musammat Lachcho had failed to prove the rent agreement on which she was suing. It was, however, presumably in consequence of this dismissal that, on the 22nd of November, 1894, a second suit was filed by Musammat Lachcho and Chunni Lal jointly against Kunj Lal and Duli Chand, to establish their title to this shop and to recover possession. This suit ended in a compromise which was made the basis of a decree passed on the 9th of April, 1895. The compromise is printed at page 26 R. of the record before us. The parties in question agreed that a decree for proprietary possession be passed in favour of the then plaintiffs, Chunni Lal and Musammat Lachcho, but this decree is subject to a condition. It is provided that, if the defendants Kunj Lal and Duli Chand pay into court for the benefit of the plaintiffs within six months Rs. 1,500, with interest, they shall then be considered to be in proprietary possession of the shop in question from the date on which such payment is made. We know that it was in order to raise money for the payment of this sum of Rs. 1,500, as well as in return for a certain further advance, that Kunj Lal and Duli Chand proceeded to mortgage this shop in favour of Kundan Lal, and it has already been explained how the latter was eventually compelled to bring a suit upon his mortgage, and how the title of the contesting defendants is derived from the auction purchase on Kundan Lal's decree. The question is whether by this compromise decree Kunj Lal and Duli Chand did or did not obtain proprietary title to the shop in question, that is to say, a title binding upon the reversioners. According to the case for the plaintiffs respondents they acquired nothing more than Musammat Lachcho was competent to transfer, namely, that lady's life interest. If this contention is sound, then Harmukh Rai as auction purchaser also acquired a proprietary title terminable with Musammat Lachcho's death, and he had no valid title to plead against the present plaintiffs.

1916

RAMDHAYA LAL v. KISHORI LAL.

The case-law on the question of the effect of a compromise decree obtained against a Hindu female in possession of limited interest or estate may be said to go back to the decision of their Lordships of the Privy Council in *Imrit Konwar* v. *Roop Narain Singh* (1). The question directly in issue in that suit was in regard to the validity of an adoption. At page 81 of the report certain general remarks are made as to the effect of litigation against a Hindu widow, when such litigation results in a compromise decree. That case has been considered and the principles enoved to be laid down therein have been followed in subsequent decisions of various High Courts in this country. We may refer to *Mussammat Raj Kunwar* alias *Sheo Murat Koer* v. *Mussammat Inderjit Kunwar* (2), *Rajlakshmi Dasee* v. *Kalyapani Dass* (3), *Govind Krishna Narain* v. *Khunni Lal* (4) and *Mahadeo* v. *Baldeo* (5). Following broadly the principles derivable from these cases, the correct view would seem to be that the compromise decree of the 9th of April, 1895, which we are now considering, was in effect nothing more than an alienation on the part of Mussammat Lachcho of a shop which had formed part of the estate of her late husband. Such alienation could only bind the reversioners if it were shown to have been made for such purposes as would justify a sale by a Hindu widow. No question of this sort is raised in the case now before us. It is, however, contended that the general principle that a decree obtained by compromise against a Hindu widow representing the estate of her late husband will not bind the reversioners is subject to certain qualifications. It has been pointed out to us that the decision of this Court in *Govind Krishna Narain* v. *Khunni Lal* (4) was actually reversed by their Lordships of the Privy Council, *vide Khunni Lal* v. *Govind Krishna Narain* (6) and we have also been referred to another case *Bihari Lal* v. *Daud Husain* (7). In both these cases the litigation was between members of the same family and their Lordships took the view that the compromise decree was of the nature of a family settlement. They had

(1) (1880) 6 C. L. R., 76.
(2) (1870) 5 B. L. R., 885.
(3) (1911) I. L. R., 38 Calc., 689.
(4) (1907) I. L. R., 29 All., 487.
(5) (1908) I. L. R., 30 All., 7.
(6) (1911) I. L. R., 33 All., 566.
(7) (1913) I. L. R., 35 All. 240.

1916

RANDHAYA LAL v. KISHORE LAL

down, however, a test which appears to tell very strongly against the appellants in the case now before us. They said that the true test to apply to a transaction which is challenged by the reversioners as an alienation not binding upon them is "whether the alienee derives title from the holder of the limited interest of life tenant." Now on the terms of the compromise decree which we are now considering and which have already been set forth, it is obvious that the alienees, namely Kunj Lal and Duli Chand, derived their title from the holder of a limited interest, namely from Musammat Lachmin. We disregard, of course, the position of Chunni Lal as a co-plaintiff, because the question of his alleged adoption has been finally determined in the negative. The decree itself recognizes the right of the plaintiff Musammat Lachmin, who, along with Chunni Lal, had sued to recover possession of the property. It contains what is virtually a covenant to transfer the absolute interest on the defendants on payment of Rs. 1,500, to be made within the specified time. We do not think that the doctrine usually settlement can or ought to be extended to suits in which the parties to the litigation were undoubtedly not members of the same family. It seems to us that the general principle laid down by this Court in *Mahadeo* v. *Bhikoo* (1) applies to the facts now before us. The contention of the appellants therefore that Kunj Lal and Duli Chand had a valid title under the compromise decree of the 9th of April, 1895, in our opinion fails.

The only other point taken is that the appellants should be treated as *bonâ fide* purchasers for value. We do not think that the doctrine embodied in section 41 of the Transfer of Property Act, No. IV of 1882, has any possible application to the facts now before us. The plaintiffs in the present case are reversioners suing to recover their own property by the avoidance of an alienation made by a Hindu widow. They cannot be said to have done anything to put forward that widow as holding an estate larger than that actually possessed by her. The contesting defendants must suffer by reason of the defective title of the original mortgagee from whom they claim.

(1) (1903) I. L. R., 30 All., 70.

1916

KANHAIYA LAL v. KISHORI LAL.

purchasers derive their own. There had been a cross-objection filed on behalf of the plaintiffs, contesting the dismissal of their claim in respect of shop No. 1 and also with regard to part of the plaintiffs' claim on account of shop No. 2. On this point we think it sufficient to say that there is nothing in the evidence to lead us to differ from the conclusion arrived at by the learned Subordinate Judge.

The result is that the appeal and cross-objection both fail, and we dismiss them both with costs.

Appeal dismissed.

Before Mr. Justice Walsh.

1916

June, 7.

W. E. McGOWAN v. JOHN GEORGE McGOWAN.*

Act No. IV of 1869 (Indian Divorce Act), section 37—Practice—Alimony—Discretion of Court.

Held that the power to make an order for alimony in favour of the wife after a decree for divorce obtained by the husband on the ground of adultery is discretionary. In a case where there was no suggestion that the husband's conduct had led to the wife's misconduct and the wife was in fact under the roof of the co-respondent, the court refused to exercise its discretion. *Kelly* v. *Kelly* (1) referred to.

This was an application for alimony by the wife after a decree nisi for divorce.

The facts of the case for the present purpose are briefly as follows:—

The petitioner Mrs. McGowan was the defendant in a suit for divorce which was decreed against the petitioner by a single Judge of this Court on the 23rd of May, 1916. This was a petition claiming alimony from the husband pending the confirmation of the decree. The defence to the application was that the wife was living with the co-respondent.

Mr. *E. A. Howard*, for the petitioner:—

A wife is entitled to alimony. She has filed an appeal against the decree for divorce and it is the legal duty of the husband to support his wife as long as the decree has not been made absolute.

* Miscellaneous Application in Matrimonial Suit No. 1 of 1916.

(1) (1870) 5 B.L.R., 71.

1916

W. E. Mc GOWAN v. JOHN GEORGE Mc GOWAN.

Babu *Saila Nath Mukerji*, for the opposite party :—

The wife is still living with the co-respondent. He is maintaining her. Her suit for judicial sepration has been dismissed. So long as she resides with the co-respondent she is not entitled to any alimony according to law ; *Holt* v. *Holt and Davis* (1). The granting of alimony is entirely at the discretion of the court and the circumstances of the case are such that no alimony should be granted The case was then argued on the merits.

Mr. *E A Howard*, in reply.

The petitioner is a woman and in a delicate condition She is residing with her father ; she has nowhere else to go

[WALSH, J.—Unfortunately the father is the co-respondent and the divorce suit has been decreed.]

The court has power under section 37 of the Indian Divorce Act, No IV of 1869, to grant alimony, even after the husband has obtained a decree for divorce on the ground of the wife's adultery ; *Kelly* v. *Kelly* (2).

WALSH, J.—The case relied upon, namely *Holt* v *Holt* (1) is the one really in point. That was an application for alimony *pendente lite* and it was held that even *pendente lite* when it was shown that the wife was living with the co-respondent, whether they were living in adultery or not, alimony should not be ordered against the husband during that period. For the purpose of an application by a wife for alimony it is always assumed that the wife is innocent. The practice of the Divorce Court seems to be uniform on the question of alimony after the wife has been convicted of adultery. The absence of any statement in the text books is probably due to the fact that it is taken for granted that an ecclesiastical court would never have listened to an application by a wife who had been convicted of adultery. I find the following authorities on the subject. In *Winstone* v. *Winstone* (3) which was of course an ecclesiastical decision, the petition by a wife for alimony after a decree *nisi* had been passed against her was ordered to be taken off the file This was in 1861. In 1883 the Court of Appeal in *Otway* v. *Otway* (4) which was a decision with regard to costs observed (on p 155) :—"Her

(1) (1866) L R, 1 P and D, 349, 38 L J, P. and M., 33.
(2) (1870) 5 B. L. R., 71.
(3) (1861) 3 S. W. and T. R, 245
(4) (1838) 13 P. D., 141.

1916

W. E. Mc GOWAN v. JOHN GEORGE Mc GOWAN

adultery prevented her from pleading the credit of her husband and prevented her from getting any alimony or allowance from the husband." Therefore it appears that there is decision by the ecclesiastical court that a wife against whom a decree *nisi* for divorce has been passed on the ground of adultery is not entitled to apply for alimony and that this was the view taken by a Court of Appeal in 1888. In the absence of any authority to the contrary it would be my duty to refuse to entertain the present application.

In this country, however, having regard to the decision in *Kelly* v. *Kelly and Saunders* (1) by Sir BARNES PEACOCK it appears to be a matter of discretion. But in the present case there being no suggestion in the suit, which I tried, that the husband's conduct led to the wife's misconduct, and the wife being in fact at the present moment under the roof of the co-respondent, I think I ought not to exercise my discretion in the manner in which it was exercised by Sir BARNES PEACOCK for the reasons given by him. The application is therefore dismissed.

Application rejected.

REVISIONAL CIVIL.

1916 *June*, 12.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BHAIRON PRASAD (DECREE-HOLDER) *v.* AMINA BEGAM (JUDGMENT-DEBTOR)*

Act No. VII of 1887 (Provincial Small Cause Courts Act), section 25—Revision—Jurisdiction of High Court—Execution of decree—Limitation—Application to court to take a step in aid of execution—Application for extension of time.

A *bond fide* application to decree-holder to pay fee for extension of time for the purpose of execution of order absolute for pre-judgment interest is an application to take a step in aid of execution and saves limitation. Where a Small Cause Court without any material on the record apparently assumed that such an application presented by the decree-holder was not *bond fide*, and consequently that such subsequent application for the execution of the decree was time-barred, it was *held* that there was ground for interference by the High Court in revision.

THE first application to execute a decree passed on the 11th of February, 1909, was made on the 9th of February, 1912. Notice

* Civil Revision No. 154 of 1915.

(1) (1870), B. L. R., 71.

1916

BHAIRON PRASAD v. AMINA BEGAM.

of the application was issued to the judgment-debtors, but was returned unserved. Thereupon, on the 3rd of April, 1912, the decree-holder made an application stating that he was trying his best to discover the address of the judgement-debtors who were reported to have left the district, and praying for time to enable him to ascertain the same. The application was granted and time was allowed up to the 19th of April, 1912. No further steps were taken by the decree-holder, and on his failure to appear in court on the 19th of April, the application for execution was struck off. The next application for execution was made on the 1st of April, 1915. The court (Court of Small Causes at Cawnpore), was of opinion that the application of the 3rd of April, 1912, for time was not a *bonâ fide* application, and on that ground distinguished the case from that of *Pitam Singh* v *Tota Singh* (1) and held the present application for execution barred by time. The decree-holder applied in revision to the High Court; the case came up before a single Judge, who referred it to a Bench of two Judges.

The following is the order of reference :—

BANERJI, J.—This application for revision of an order of the Judge of the Small Cause Court at Cawnpore dismissing an application for execution of a decree on the ground of limitation has been preferred by the decree-holder. He obtained his decree on the 11th of February, 1909, and made his first application for execution on the 9th of February, 1912. Upon that application notice was issued to the judgement-debtor, but it was returned unserved. On the 3rd of April, 1912, an application was made for time to apply for service on the judgement-debtor. The court granted the application and fixed the 19th of April. On that date, as the decree-holder took no steps, the application for execution was struck off.

The present application was filed on the 1st of April, 1915. It is clearly beyond time from the 9th of February, 1912, the date of the last application for execution, but the decree-holder contends that the application for time filed on the 3rd of April, 1912, was an application to take a step in aid of execution and therefore gave a fresh start for the computation of limitation and

(1) (1907) I. L. R., 29 All., 301.

1916

BHAIRON PRASAD v. AMINA BEGAM

the case of *Pitam Singh* v. *Tota Singh* (1) was relied upon in support of the execution. It seems to me that an application for time, so far from being an application to take a step in aid of execution, is an application to delay execution and it seems to me to be doubtful whether limitation should be computed from the date of such application. As, however, a different view was taken in the case to which I have referred I deem it desirable that this case should be heard by a Bench of two Judges. I accordingly refer this case to a Bench of two Judges.

The case was then heard by a Division Bench.

Babu *Sheo Dihal Sinha*, for the applicant :—

An application for time to ascertain the whereabouts of the judgement-debtors, whom it is necessary to serve with notice before the execution can proceed further, is in effect one to further the execution and not to retard it. Until the address of the judgement-debtors can be ascertained the matter can go no further, and the only step the decree-holder can at the time possibly take in furtherance of the execution is to take time to enable him to make inquiries about the judgement-debtors' whereabouts. Under such circumstances an application for time is an application to the court to take a step in aid of execution, and saves limitation; *Pitam Singh* v. *Tota Singh* (1). There is no justification for the lower court's opinion that the application for time was not *bonâ fide*. This was an inference from the fact that nothing further was done by the decree-holder on the 19th of April, 1912. But at the time when the application on the 3rd of April was made it was unquestionably *bonâ fide*. It did not lose that character by what happened afterwards. His subsequent dilatoriness or negligence would not detract from the *bona fides* of the application when it was made. It cannot be conceived why the decree-holder would ask for time if the address of the judgement-debtors was known to him on the 3rd of April. He could have had no object in putting off the execution of his decree. The affidavit now filed explains the reason why nothing was done on the 19th of April, 1912.

Mr. *Ibn Ahmad*, for the opposite party :—

The application of the 3rd of April, 1912, was not an application to the court to take a step in aid of execution. The

(1) (1907) I. L. R., 29 All., 301.

1916

BHAIRON PRASAD v. AMINA BEGAM.

court was not asked by it to do anything to further the execution of the decree. Such an application cannot give a fresh start for the computation of limitation *Kartick Nath* v. *Juggernath Ram* (1), *Umed Ali* v. *Abdul Karim* (2).

The failure of the decree-holder even to appear in court on the 19th of April, 1912, the date on which the time granted to him expired, shows that he was not in earnest about the matter, and his conduct justified the inference that he was not acting *bonâ fide*. Even if the decision of the lower court be wrong no interference in revision is called for. It has been held that a wrong decision on a question of limitation is not a ground for interference in revision under section 25 of the Provincial Small Cause Courts Act; *Sarman Lal* v. *Khuban* (3), *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (4).

Babu *Sheo Dhal Sinha*, was not heard in reply.

PIGGOTT, J.—This is an application against a decision on the execution side of the learned Judge of the Court of Small Causes at Cawnpore. The question before the court below was whether a certain application for execution was within time. It was within time if a previous application by the decree-holder made on the 3rd of April, 1912, was an application to the proper court to take a step in aid of execution. The application of the 3rd of April, 1912, has been read to us. It is to the effect that the decree-holder is doing his best to discover the address of the judgement-debtor, a *pardanashin* lady, and her son and as he has hitherto failed to do so, he asks the court for time to enable him to prosecute his inquiries further. He was given time to the 19th of April, 1912; but as he had taken no steps in the interval and failed to appear before the court on the 19th of April, 1912, his application was struck off. The attention of the learned Judge of the court below was duly called to the decision of this Court in *Pitam Singh* v. *Tota Singh* (5). He appears to have fully realized that he was bound to follow that decision. He distinguished it on the ground that the present decree-holder's application of 3rd of April, 1912, was not in his opinion made in good faith. He gives no reason for

(1) (1899) I. L. R., 27 Calc., 285. (3) (1894) I. L. R., 17 All., 422.

(2) (1903) I. L. R., 35 Calc., 1060. (4) (1912) I. L. R., 39 Calc., 473.

(5) (1907) I. L. R., 29 All., 391.

1916

BHAIRON PRASAD v. AMINA BEGAM.

this opinion and we were unable to discover any such reason on examining the record. We eventually decided to give the parties time to file affidavits explaining their position. An affidavit has to-day been filed on behalf of the decree-holder. He states that he was incapacitated by illness shortly after his application of the 3rd of April, 1912, was granted, and was consequently unable to take any steps or to attend the court on the date fixed. After that he continued to make inquiries as to the whereabouts of the judgement-debtors and presented his further application for execution as soon as he had been able to discover their correct address.

This affidavit is not contradicted. I think under the circumstances the decision of the court below did not proceed on a pure question of law. It was arrived at by gratuitously assuming a question of fact against the decree-holder. On this ground I would allow this application, set aside the order of the court below and remand the case to that court with directions to re-admit the application for execution to its pending file and to proceed with it according to law.

WALSH, J.—I agree. I think it is impossible to hold that an honest application to extend time, that is, to prevent limitation running against you, is not a step in aid of execution. It is not easy to see what object any decree-holder can have in an application for time, unless it is to assist himself in execution of his decree. Mr. Justice BANERJI thought that there was a conflict between the decisions of the Calcutta High Court, and this Court on this question. It is extremely difficult to ascertain with certainty from the reports whether this is so or not. The view attributed to the Calcutta Court has its origin in a case where the point was not necessary for the decision and where there would have been good reason for holding, if it were necessary, that the application for time was neither necessary for *bonâ fide*, and was rightly rejected. And if the view taken in the Calcutta decision really is, and there is nothing in the reports inconsistent with it, that an application for time, if it is shown by subsequent events not to have been a genuine application at all, may properly be held not to have been a step in aid of execution, I should agree with it, but the decision in this Court which my brother PIGGOTT

1916

BHAIRON PRASAD v. AMINA BEGAM

has already referred to put the case on clear, and, I think, absolutely unassailable ground. If it is *bonâ fide*, it is clearly in aid of execution. The result is that *primâ facie* such an application is in aid of execution until it is shown to be *malâ fide*. I do not think there is really any conflict between these cases.

BY THE COURT.—The application is allowed, the order of the court below set aside, and the case remanded to that court with directions to re-admit the application for execution to its pending file and to proceed with it according to law. The decree-holder is entitled to his costs.

Application allowed.

Before Mr. Justice Muhammad Rafiq

1916 *June*, 13

EMPEROR v. KASHI SHUKUL AND ANOTHER.*

Criminal Procedure Code, section 476—Practice—Order for prosecution for perjury—Court bound to set out assignments of perjury alleged—Civil Procedure Code, section 115—Revision—Material irregularity.

Held that when a civil court makes an order under section 476 directing that a person should be prosecuted for perjury, such court is bound to set forth in its order the specific assignments of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of section 115 of the Code of Civil Procedure.

THE facts of this case were as follows:—

One Kashi Shukul brought a suit against Rameshar Misra for recovery of money on the basis of a *chitthi*, or letter, dated the 16th of March, 1911. The defendant denied the writing of the *chitthi* and the passing of the consideration. The Munsif who tried the suit held the claim to be false and the *chitthi* not genuine.

He accordingly dismissed the suit on the 16th of September, 1914. Several months afterwards, the defendant applied for sanction to prosecute the present applicants on charges of forgery and perjury. On the 3rd of May, 1915, this application was refused, but a notice was issued to the present applicants by the Munsif who tried the suit to show cause why an order for their prosecution should not be made. The notice was given presumably under section 476 of the Code of Criminal Procedure. Subsequently, another Munsif came in place of the Munsif who had tried the

* Civil Revision No. 51 of 1916.

1916

Indian Penal Code. It appears that Kashi Shukul, one of the applicants, brought a civil suit against Rameshar Misir for the recovery of Rs. 522, principal and interest on the basis of a *chitthi* or letter, dated the 16th of March, 1911. Rameshar Misir denied the execution of the *chitthi* and the receipt of consideration. The learned Munsif who tried the civil suit held that the claim was a false one and that the *chitthi* was not genuine, and the claim was accordingly dismissed on the 16th of February, 1914. Several months after, an application was made by Rameshar Misir for sanction to prosecute the present applicants on charges of perjury and forgery. The application, it is said, was rejected on the 3rd of May, 1915. A notice, however, was issued by the Munsif to the present applicants to show cause why they should not be committed to take their trial on the charges of perjury and forgery. The notice was presumably given under section 476 of the Criminal Procedure Code. In the meantime the learned Munsif who had tried the suit and issued the notice was transferred and another Munsif came in his place. He passed an order on the 20th of February, 1916, directing the prosecution of Kashi Shukul under sections 193, 471 and 467 of the Indian Penal Code, of Sarju Shukul under section 193 of the Indian Penal Code, and of Bhagirath Shukul under sections 193 and 467 of the Indian Penal Code. He further added that the Magistrate will convict the three applicants of any other charge that may be proved. It appears that the learned Munsif did not specify the statements of the witnesses in respect of which he wanted them to be prosecuted for the charges of perjury, nor did he specify the portion of the document in respect of which he was of opinion that Kashi Shukul and Bhagirath Shukul had committed forgery. The applicants in their application in revision to this Court urged that the order of the Munsif is bad in law inasmuch as it is vague and gives a general direction to the Criminal Court to try them and convict them on any charge that may be proved. For the opposite party the objection is that this revision is a civil revision and the powers of this Court on the Civil side are narrower than those on the Criminal side. The omission by the learned Munsif in his order to specify the particulars of the charges is not such a jurisdictional error that this Court is

Pandey, Kishan Lal, and Kishan Lal

1916

EMPEROR v. KASHI SUKUL.

suit, and he passed the order on the 26th of February, 1916, directing prosecution of the present applicants under sections 193, 467, and 471 of the Indian Penal Code and also for such other offence or offences they may be found to have committed. Against this order the present application in revision was made.

Mr. *J. M. Banerji*, for the applicants:—

The order of the Munsif is more of the nature of a roving commission. There were several statements made and unless the order specifies clearly what statements are false, the order, as it stands, is bad. Numerous Calcutta rulings were cited in support of this contention.

Mr. *W. K. Porter*, (with him Mr. *A. E. Ryves*), for the opposite party:—

This is not a case in which the High Court should interfere having regard to section 115 of the Civil Procedure Code; *In the Matter of the Petition of Bhup Kunwar* (1). The applicants here are coming up, as they are bound to do, on the Civil side of the Court, not the Criminal side, and the revisional powers of this Court on the Civil side are not nearly so wide as those on the Criminal side. This is apparent from a comparison of sections 195 and 476 of the Code of Criminal Procedure with section 115 of the Code of Civil Procedure. Section 476, Criminal Procedure Code, regards the order of the Munsif as a complaint, though it is a complaint made by a judicial officer and not by a private person. Being a complaint it need not be specific, and it is against the practice of this Court to interfere with complaints except under very special circumstances.

There is no doubt that the Munsif might have been more specific. It is, however, absolutely ridiculous for the other side to say that they do not know what they are prosecuted for. The accused are not taken by surprise. They did not even take the trouble to appear to show cause against the notice issued to them.

Mr. *J. M. Banerji*, was not heard in reply.

MUHAMMAD RAFIQ, J.—This is an application in revision from the order of the Munsif of Gorakhpur, made under section 476 of the Criminal Procedure Code, directing the prosecution of the applicants on charges under sections 193, 471 and 467 of the

(1) (1904) I. L. R., 26 All., 249.